88-1586

Supreme Court, U.S.
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No. 88-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

GEORGE JACKSON,

Petitioner,

v.

LIQUID CARBONIC CORPORATION,
and DAVID FARRELL and BARRY MANUEL,
d/b/a INDUSTRIAL MEDICAL CENTER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED[1]

1. Does section 301 of the Labor-Management Relations Act preempt state civil rights and privacy law claims that are asserted by a unionized employee against employer-mandated, without-cause drug testing where the preemption ruling will effectively preclude the state from vindicating its own civil rights and privacy laws?

2. Can a finding of waiver of a unionized employee's state civil rights and privacy law claims be predicated on a federal court's mere assumption of waivability?

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[1] All parties to the proceeding below are listed in the caption.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner George Jackson petitions the Court to issue a writ of certiorari to the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

This petition seeks review of a decision of a divided panel of the

United States Court of Appeals for the First Circuit, which is reported as Jackson v. Liquid Carbonic Corporation, 863 F.2d 111 (1st Cir. 1988) (per Selya, J. and Coffin, J.; Bownes, J., dissenting), and is reprinted in the Appendix to this petition, at App. 1a to 69a. The decision of the district court is unreported, and is reprinted at App. 70a to 83a.

JURISDICTION

The court of appeals entered an initial opinion on December 1, 1988 and amended opinions on December 13, 1988 and December 29, 1988. The judgment of the court of appeals was entered on December 1, 1988, and is reprinted at App. 84a. The orders of the court of appeals denying petitioner's petition for rehearing and suggestion for

rehearing en banc were entered on December 29, 1988; they are unreported and are reprinted at App. 85a to 86a. The Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

Section 301(a) of the Labor Management Relations Act, 29 U.S.C. §185(a) provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

M.G.L. c.12, §§11H, 11I, the Massachusetts Civil Rights Act, provide:

> Whenever any person or persons, whether or not acting under color of law, interfere by threats,

intimidation or coercion, or attempt to interfere by threats, intimidation or coercion, with the exercise or enjoyment by any other person or persons of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, the attorney general may bring a civil action for injunctive or other appropriate equitable relief in order to protect the peaceable exercise or enjoyment of the right or rights secured. Said civil action shall be brought in the name of the commonwealth and shall be instituted either in the superior court for the county in which the conduct complained of occurred or in the superior court for the county in which the person whose conduct complained of resides or has his principal place of business.

Any person whose exercise or enjoyment of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, has been interfered with, or attempted to be interfered with, as described in section 11H, may institute and prosecute in his own name and on his own behalf a civil action for injunctive and other appropriate equitable relief as provided for in said section,

> including the award of compensatory money damages. Any aggrieved person or persons who prevail in an action authorized by this section shall be entitled to an award of the costs of the litigation and reasonable attorneys' fees in an amount to be fixed by the court.

M.G.L. c.214, §1B, the Massachusetts privacy statute, provides:

> A person shall have a right against unreasonable, substantial or serious interference with his privacy. The superior court shall have jurisdiction in equity to enforce such right and in connection therewith to award damages.

STATEMENT OF THE CASE

A. Facts.

Petitioner George Jackson began working as a truckdriver for respondent Liquid Carbonic Corporation (hereinafter "respondent") in 1976. App. 2a-3a. Respondent's employees, including Jackson, were represented in collective bargaining by Local 49, International

Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, and were covered by a collective-bargaining agreement. App. 3a. Article XXI of the agreement sets forth a standard "management rights" clause, providing respondent with "the right to post reasonable rules and regulations from time to time. . . ." App. 6a. In Article XII, the agreement provides a standard grievance and arbitration procedure for resolving disputes about the agreement. App. 6a.

In March 1985, respondent instituted a mandatory drug testing program requiring all drivers, whether or not there was evidence to suspect them of drug abuse, to submit urine samples every 24 months for chemical evaluation to detect the presence of certain drug

metabolites. App. 4a. Although the urine was to be submitted as part of a biannual medical exam mandated by the U.S. Department of Transportation, the Department of Transportation did not at that time require urine testing for drugs, see 49 C.F.R. §391.43 (1987); this was solely respondent's program.[1]

Respondent presented each truckdriver with a "consent" form that stated that as a condition of continued employment the employee's urine was to be periodically tested for evidence of drug

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[1] The Department of Transportation subsequently promulgated regulations, effective December 21, 1988, calling for a drug-testing program. See 49 C.F.R. sec. 391.81-.123 (1988). Those regulations were enjoined by a federal district court in California. Owner-Operators Independent Drivers Assoc. of Am., Inc. v. Burnley, No. C-88-4547MHP (N.D.Cal. Dec. 21, 1988); see also id., Memorandum and Order granting preliminary injunction (Jan. 6, 1989).

ingestion. App. 4a. Petitioner signed the form under duress, knowing that he would lose his job if he did not. Id.

In January 1986, petitioner went to the Industrial Medical Center in Lawrence, Massachusetts, for his biannual medical exam. As directed, petitioner left his urine sample, unlabeled, on the back of a toilet along with other unlabeled samples. On February 13, 1986, respondent suspended petitioner without pay because it had received a report that his urine tested positive for marijuana. App. 5a. Petitioner was fired on February 20, 1986, after being informed that the presence of cannabinoid was confirmed by retesting. Petitioner protested that he had never ingested marijuana and requested an independent drug test, but

respondent refused to reconsider its decision. Id. Although a meeting was held regarding petitioner's firing at which union representatives were present, no grievance was filed. App. 6a.

B. Proceedings Below.

On December 12, 1986, petitioner filed a three-count complaint in Middlesex County Superior Court of Massachusetts asserting only state law claims. Petitioner's complaint alleged that respondent's mandatory drug testing policy and procedures violated the Massachusetts Civil Rights Act, M.G.L. c.12, §§ 11H, 11I, the Massachusetts invasion of privacy statute, M.G.L. c.214, §1B, and the state common law of wrongful termination. The complaint

sought equitable relief, including job reinstatement and an injunction prohibiting respondent from conducting further urine testing for evidence of drug ingestion, as well as compensatory damages.

Respondent removed the case to the United States District Court for the District of Massachusetts, and moved to dismiss the complaint alleging that petitioner's state law claims were preempted by section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. §185.[2]

The district court (Zobel, J.) rested

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[2] Respondent also filed a third-party complaint against David Fagell and Barry Manuel d/b/a Industrial Medical Center, the organization that collected petitioner's urine and had custody of it until it was shipped to a laboratory for chemical examination.

its jurisdiction on diversity grounds. Treating respondent's motion to dismiss as a motion for summary judgment, the district court accepted as true the following allegations: (a) that "at the time of the test, [respondent] had no reason to believe that [petitioner] was a drug user," (b) that petitioner "never ingested marijuana," (c) that respondent's "testing procedures were flawed, as the samples were inadequately labeled," and (d) that petitioner suffered damages as a result of respondent's testing policy. App. 73a-74a. The district court nevertheless entered summary judgment for respondent on all three of petitioner's claims.

The district court characterized petitioner's state law claims as alleging no more than that respondent's

drug-testing policy "was not 'reasonable' within the meaning of the contract." App. 81a-82a. The district court then reasoned that since the collective-bargaining agreement was "broad enough to include a challenge to the reasonableness of [respondent's] drug rule," petitioner's state law claims were preempted by section 301. App. 82a.

A divided court of appeals affirmed the district court's decision.[3] The majority, in an opinion authored by Judge Selya, held that petitioner's claims under the Massachusetts Civil Right Act and the privacy statute were

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[3] The court of appeals did not review the district court's judgment with respect to the wrongful discharge claim because petitioner voluntarily waived any error with respect to that claim.

preempted by section 301 because "[t]hey are not necessarily independent of the labor contract." App. 35a (emphasis in original). The majority based its holding upon the premise that the Massachusetts Civil Rights Act, the Massachusetts privacy statute, and the Massachusetts Supreme Judicial Court decisions explicating those statutes were not "sufficiently explicit" or "sufficiently pointed" to establish a right to privacy independent of the collective-bargaining agreement. App. 29a-30a & n.3. Reasoning that the development of state privacy law and state constitutional law generally parallels that of federal law, and that state courts depart from federal rulings only to further their own views of the principles embodied in federal law, App.

19a-20a, the majority concluded that the Massachusetts Supreme Judicial Court would necessarily defer to the collective-bargaining process and condition petitioner's state-law privacy rights on the terms of the collective-bargaining agreement negotiated between petitioner's union and his employer. App. 29a.

The majority opinion also found that examination of the terms of the collective-bargaining agreement was required since whatever the scope of petitioner's privacy claims vis-a-vis mandatory, without-cause drug testing, the union might have waived petitioner's right to assert such claims by agreeing to the sweeping management rights clause that allowed respondent to promulgate "reasonable" rules. The majority

reached this conclusion without analyzing whether state privacy claims were waivable under Massachusetts law, by either an individual or a bargaining unit.

In dissent, Judge Bownes found no support for the conclusion that resolution of petitioner's privacy claims necessarily "requires the interpretation of [the] collective-bargaining agreement." App. 60a. To the contrary, he concluded that where, as here, the nature or scope of a state law claim is unclear, the federal court should not guess at the parameters of the claim but should permit the state court to determine the scope of the state law claim in the first instance. App. 59a; 63a-65a.[4] Judge Bownes

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[4] Although the presence of diversity jurisdiction would have prevented the

reasoned that preemption of developing state law claims would effectively prevent the state courts from articulating the scope of their own laws: for a federal court to hypothesize about the scope of a state law claim, and then to declare the hypothesized claim preempted by federal law, makes "a nullity of any independent privacy rights established by the states" and conflicts with decisions of this Court recognizing and protecting independent state law rights from preemption. App. 60a-61a (citing Lingle v. Norge Division of Magic Chef, Inc., 108 S. Ct. 1877, 1884 (1987)).

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case from being remanded to state court, the state court could have had an opportunity to address the issue on certification by the federal court. See infra, at pp. 23-26.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH RECENT DECISIONS OF THIS COURT AND RAISES AN IMPORTANT QUESTION OF FEDERALISM THAT THIS COURT SHOULD RESOLVE

A. Section 301 Preemption

The majority's approach to section 301 preemption of state law claims is in direct conflict with this Court's recent decision in Lingle v. Norge Division of Magic Chef, Inc., 108 S.Ct. 1877 (1988). In Lingle, the Court reiterated that there is no section 301 preemption unless resolution of a state law claim depends upon the meaning of a collective-bargaining agreement. See 108 S.Ct. at 1883. In this case, no principles of state law mandated -- or even suggested -- that resolution of petitioner's privacy claims under the

Massachusetts Civil Rights Act and the privacy statute required construing the terms of a collective-bargaining agreement. Nonetheless, the majority concluded that preemption was required. In so doing, the majority disregarded the plainly contrary teaching of Lingle. Indeed, as Judge Bownes stated in dissent, "Lingle mandates that section 301 does not preempt the state law claim in the instant case." App. 69a (emphasis supplied).

The majority's approach turns the preemption standard on its head. The majority based its preemption conclusion not, as dictated by Lingle, on a finding that state law principles required an interpretation of the terms of a collective-bargaining agreement. Rather, it found that petitioner's state

law claims were not yet so clearly established by statute or judicial explication as to "allow analysis of the Agreement to be foregone." App. 29a n.3 Thus, the majority found that petitioner's state law claims were "not necessarily independent of the labor contract." App. 35a (emphasis omitted). But the proper test is not whether state law claims are "not necessarily independent" of the agreement, but whether they are necessarily dependent on the agreement. See Lingle, 108 S.Ct. at 1883; Allis-Chalmers v. Lueck, 471 U.S.C. 202, 213 (1985). The majority's approach to preemption is, therefore, directly contrary to this Court's decisions.

B. Federalism

The majority's approach raises the

important question of whether a federal court should be permitted effectively to take away from the state its power to decide for itself the parameters of its laws. It is an extremely important question both of federal labor relations law as well as of federalism generally, since the majority's result may well frustrate the state's exercise of its police power with respect to the workplace rights of unionized employees.[5]

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[5] The issue presented in this case is likely to recur because of increasing state regulation in this area. In addition to Massachusetts' civil rights and privacy statutes, six states -- Connecticut, Iowa, Minnesota, Montana, Rhode Island and Vermont -- have recently adopted legislation regulating drug testing by employers. ACLU Public Policy Report, Liberty at Work, 5-7 (1988). Three states -- California, Massachusetts and New York -- and the District of Columbia are also considering legislation to regulate electronic monitoring of employees. Id. at 11.

The majority filled the perceived vacuum in state law with its own hypothesis that were the Supreme Judicial Court of Massachusetts faced with the claim of a unionized employee asserting privacy rights against his employer because of mandatory, without-cause drug testing programs, the state court would necessarily defer to the collective-bargaining process and require interpretation of the terms of the collective-bargaining agreement to resolve those privacy claims. The majority's hypothesis of what the state court would do was colored by its assumption that in privacy law as in constitutional law, state law "tracks the development of federal law" and

state courts depart from the decisions of federal courts only "to further their views of the principles embodied in the federal [law]." App. 19a-20a. The majority's ruling has, in effect, "preclude[d] the state court from ever making its own determination on the matter by declaring that the issue so determined is preempted by federal law." App. 59a.

The majority's response that the state "remains free to create" a right of privacy independent of analysis of the collective-bargaining agreement is inadequate. Indeed, it appears likely that if the majority's ruling is upheld, no Massachusetts state court will have an opportunity to decide how a privacy claim by a unionized employee should be resolved. Based on the majority's

holding, claims such as those petitioner raised under the state civil rights act and privacy law would be preempted by section 301, and may be considered "completely preempted" in the sense that supports removal jurisdiction. See Caterpillar Inc. v. Williams, 107 S.Ct. 2425 (1987). If so, then any future case filed in state court by a unionized employee raising those claims would automatically be removable to federal court. Once removed, the federal district court would be bound by the majority's holding in this case, thus frustrating the state's ability to develop the scope of its own privacy laws.

C. Certification to the State Court

Since a definitive pronouncement from the state court might have at the least

"materially changed" the nature of the constitutional question here, see Bellotti v. Baird, 428 U.S. 132, 147 (1976), the majority should have granted petitioner's request, made on petition for rehearing, to certify to the Supreme Judicial Court "appropriate questions concerning the meaning" of the two statutes at issue in this case. See id.

Certification appears particularly appropriate since the development of the scope of privacy rights vis-a-vis mandatory, without-cause drug testing is in its nascent stage in Massachusetts. Indeed, the Supreme Judicial Court of Massachusetts has only recently been presented with two aspects of the broad issue of mandatory drug testing.[6]

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[6] Subsequent to the publication of the opinion below, the Supreme Judicial Court of Massachusetts issued Horsemen's Benevolent & Protective Association,

Massachusetts should be allowed to

Inc. v. State Racing Commission, 403 Mass. 692, 532 N.E.2d 644 (1989), and Bally v. Northeastern University, 403 Mass. 713, 532 N.E.2d 49 (1989).

In Horsemen's, the Supreme Judicial Court found the State Racing Commission's drug testing program of licensees, such as owners, trainers, and jockeys, unconstitutional under the state constitution. The program had two bases for testing: random, without-cause selection, and testing on reasonable suspicion. The random testing was held unconstitutional because the Supreme Judicial Court found lacking the Commission's need to conduct the random search in its balance against the invasiveness of the search and seizure, see 403 Mass. at 705, 532 N.E.2d at 651-52; the testing on reasonable suspicion did not pass constitutional muster under the state constitution because the regulation failed to meet the requisites for probable cause for such testing. Id. at 705-06, 532 N.E.2d at 652.

In Bally, the Supreme Judicial Court found that a university athlete's state civil rights and privacy rights were not violated by a private university's drug testing program. In so concluding, however, the Supreme Judicial Court recognized that privacy claims brought by employees might be treated differently. The court distinguished the employment context for purposes of both the state civil rights act and the

develop for itself its own view on whether a unionized employee should receive certain privacy protections under state law, or instead be left to

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state privacy law, noting that the loss of a contract right is a more serious harm than the exclusion from intercollegiate sports, and that a higher standard for protection of privacy applies in the private employment context. 403 Mass. at 719-21, 532 N.E.2d at 53-54.

Taken together, Horsemen's -- which holds that mandatory drug testing can violate the state constitution -- and Bally -- which implies that the state court will scrutinize an employer-mandated drug testing program more strictly than that of an athletic program at a private university -- suggest that the state court may be more hospitable to petitioner's claims than the majority indicated. Since the majority did not have the benefit of Horsemen's and Bally when it issued its opinion below, it would be appropriate for this Court to summarily reverse this case, and remand to the court of appeals for further consideration in light of those two cases.

whatever protections those unions that wish to bargain on this issue can obtain.

D. Congressional Intent

The majority's approach also fails to consider adequately Congressional intent, the ultimate touchstone in preemption analysis. Given the respect due to the states in our federal system, it has long been emphasized by the Court, and confirmed in Lingle, that the preemption of laws providing minimum substantive guarantees to workers, "should not be lightly inferred . . . since the establishment of labor standards falls within the traditional police power of the state." 108 S.Ct. at 1885.

This Court recently reconfirmed that "it would be inconsistent with

congressional intent under [section 301] to preempt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract." Lingle, 108 S.Ct. at 1883-84 n.10, quoting Allis-Chalmers Corp., 471 U.S. at 212. The majority disregarded these principles and found preemption without any evidence of Congressional intent to thwart the development of state privacy laws.

This Court should either grant certiorari in this case and summarily reverse the judgment below, or grant certiorari and grant plenary review.

II. THE DECISION BELOW REGARDING WAIVER OF STATE LAW RIGHTS IS ALSO CONTRARY TO LINGLE AND THE FEDERALISM PRINCIPLES OF THAT DECISION

Another conflict between the majority opinion and Lingle is its analysis of

the waiver issue. Contrary to the teaching of this Court in Lingle, 108 S.Ct. at 1883 n.9, the majority collapsed the two distinct inquiries of preemption and waiver into one question. Moreover, the majority found petitioner's state law claims preempted in part based on its assumption that those claims could have been waived by the union under state law. In so doing, the majority failed to follow the proper waiver analysis set forth in Lingle, thus further intruding on the state's ability to develop the scope of its laws.

In Lingle, this Court stated that

> [w]hether a union may waive its members' individual, nonpre-empted state-law rights, is, likewise, a question distinct from that of whether a claim is pre-empted under [sec.] 301 . . . Id. (emphasis in original).

The Court in Lingle made clear that (a) the question of pre-emption under section 301 is separate and distinct from the question of waiver, and (b) that states have prohibited unions from waiving certain individual rights and that the issue of waivability is, in the first instance, a matter for the states themselves to decide. Id.

A. Confusing Preemption with Waiver

The first way in which the majority's waiver methodology conflicts with that set forth in Lingle is that it folds into one the two independent questions of preemption and waiver. For example, describing petitioner's claims, the majority states:

> Put another way, the dimensions of appellant's cognizable expectation of privacy depend to a great extent upon what concessions the union made regarding working conditions during collective-bargaining.

App. 39a.[7] But what concessions the union had made -- what rights the union had waived -- is a different question from whether an employee's state law right to privacy against an employer's mandatory random drug testing is preempted. The majority treats the two as the same question.

B. Assumption of Waivability

The second conflict between the majority opinion and Lingle is the majority's rash assumption that petitioner's state law claims could be waived by his union.[8] Under Lingle the

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[7] In the majority's original opinion of December 1, 1989, the sentence read as follows:

> Put another way, the dimensions of appellant's cognizable expectation of privacy depend to a great extent upon what rights the union, on his behalf, had bargained away (emphasis supplied).

[8] On two occasions this Court has held

court of appeals should have inquired whether state law permits a union to waive such state law claims. See Lingle, 108 S.Ct. at 1883 n.9.[9] In this

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that unions cannot waive certain federal statutory rights of individual employees. See Alexander v. Gardner-Denver Co., 415 U.S. 36, 51 (1974) (union cannot waive rights conferred by Title VII); Barrentine v. Arkansas-Best Freight System, 450 U.S. 728, 745 (1981) (rights under Fair Labor Standards Act not waivable); cf. McDonald v. City of West Branch, Michigan, 466 U.S. 284 (1984) (permitting 42 U.S.C. sec. 1983 civil rights claim despite previous submission to grievance and arbitration).

[9] Such an inquiry may lead to the further questions (a) whether a state bar to waiver is preempted, and (b) whether such a waiver actually occurred. In this csae, the majority made neither inquiry, but instead based its decision on the untested hypothesis that petitioner's state law claims could be waived.

To the extent the majority opinion suggests that the "sweeping management rights clause" provides such a waiver, see 43a-45a, its conclusion is contrary to this Court's decisions in Lingle, 108 S.Ct. at 1883 n.9 and Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708-

case, the majority conducted no such examination or inquiry. To the contrary, it merely assumed that the union had the power to waive petitioner's privacy rights, notwithstanding state law indicating that an individual's personal, state-created rights (such as privacy rights) cannot be waived by a union.[10]

The result ordained by the majority opinion clashes not only with state law

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709 (1983), both of which require "clear and unmistakable" evidence of waiver.

[10] In the context of the state law right against unlawful discrimination, for example, the Supreme Judicial Court of Massachusetts has held that a union does not possess the power to bargain away statutory rights that are of a "personal, and not merely economic, nature." School Committee of Brockton v. MCAD, 377 Mass. 392, 399, 386 N.E.2d 1240, 1244 (1979).

but also with the federal labor law policy by "penaliz[ing] workers who have chosen to join a union by preventing them from benefiting" from substantive state legal standards. See Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 756 (1985).

Issues of waiver are likely to recur and raise important questions concerning the ability of a union to bargain away an employee's personal state law rights.[11] If the Court does not summarily reverse the judgment below, the Court should grant certiorari on this question and grant plenary review.

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[11] Indeed, if as the majority suggests, a broad management rights clause, standard to thousands of collective-bargaining agreements across the country, can, without more, establish a finding of waiver, then a host of statutorily-based personal rights of workers are at risk of waiver.

CONCLUSION

For all the foregoing reasons, the Court should grant the petition for a writ of certiorari and summarily reverse the judgment of the court of appeals, or, in the alternative, grant plenary review.

Respectfully submitted,

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Dated: March 28, 1989

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 87-2073

GEORGE JACKSON,
Plaintiff, Appellant,

v.

LIQUID CARBONIC CORP., ET AL.,
Defendants, Appellees

SELYA, Circuit Judge. This appeal presents a narrow question, but one of considerable significance. It requires that we decide whether an ex-employee's state-law claims for invasion of privacy, mounted in the wake of the employer's unilateral inauguration of a drug-testing program (on the supposed authority of a collective bargaining agreement), are preempted by the terms and tenor of section 301 of the Labor

Management Relations Act, 29 U.S.C. §185 (1982).[1] The district court answered this inquiry in the affirmative, and dismissed the former employee's suit. Although we regard the question as close, we believe that the district court reached the appropriate result. We therefore affirm.

I. BACKGROUND

Beginning in 1976, plaintiff-appellant George Jackson toiled for defendant-appellee Liquid Carbonic Corporation (L-Corp), principally as a

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[1] Section 301 reads in relevant part:

> Suit for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties. . . .

29 U.S.C. §185(a)(1982).

truckdriver. At all times material hereto, L-Corp and Local 49, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers, were parties to a collective-bargaining agreement (Agreement) and Jackson, a union member, was part of the bargaining unit. By early 1986, plaintiff was working out of appellee's terminal in Tewksbury, Massachusetts and was engaged in hauling pressurized gases -- materials which were invariably volatile, often hazardous, and deserving of cautious handling. It was work of a kind where, one suspects, there might be old practitioners, and there might be bold practitioners -- but there would likely be few (if any) old, bold practitioners.

In compliance with regulations issued

by the Federal Highway Safety Administration, see 391.41 (1987) L-Corp's truckdrivers were required to submit to biennial medical examinations. The examination necessitated, inter alia, that a urine specimen be taken and a urinalysis performed to check for diabetes. See 49 C.F.R. §391.43 (1987). But in March 1985, appellee added a new wrinkle; it disseminated a document entitled "Transportation Bulletin I-13" in which it announced that the urine samples would thereafter be screened not only for diabetes, but for the presence of alcohol and various narcotic drugs. L-Corp then distributed consent forms and notified the drivers that permitting these tests to be performed was a condition of continued employment.

Neither Local 49 nor plaintiff

challenged the broadened protocol when management inaugurated it. Rather, Jackson signed the consent form, reported for his next scheduled examination several months after the format was amended, and gave a urine specimen. The new tests were performed. On February 13, 1986, Jackson was informed that traces of marijuana had been detected. A week later, notwithstanding his denial of all marijuana use, he was dismissed. Plaintiff requested an "independent" drug test. The employer declined. The firing stood.

At this juncture, we refer to the pertinent provisions of the Agreement. The union pact was in effect both in 1985 (when the drug-testing program was announced) and in 1986 (when appellant

underwent his medical examination).

Article XXI comprised a fairly standard "management rights" clause, giving L-Corp "the right to post reasonable rules and regulations from time to time.... " Article XII rendered all disputes "involving the meaning, application, or interpretation of, or compliance with, the provisions of" the Agreement subject to mandatory grievance and arbitration procedures. Jackson never pursued the grievance procedures available to him thereunder, although, shortly after his discharge, representatives of Local 49 met with management to discuss the situation. After the lone informational meeting, and in the absence of any formal complaint by the aggrieved employee, the union took no further action.

The matter, however, was far from over. That December, appellant brought an action in a Massachusetts state court seeking, inter alia, an injunction barring further drug testing and an award of damages. L-Corp removed the case to the United States District Court for the District of Massachusetts. Because of the acknowledged presence of diversity of citizenship and a controversy in the requisite amount, 28 U.S.C. §1332(a), jurisdiction is not in issue. [2]

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[2] L-Corp also premised jurisdiction on an alternative basis, viz., the existence of a federal question within the ambit of 28 U.S.C. §1331 -- an assertion which hinged on the company's view of §301. Appellant vigorously disputes this claim. We are spared the necessity of addressing the matter in those terms, as diversity comprises an independently sufficient hook upon which federal jurisdiction may be hung.

Jackson's complaint alleged that his employer had coerced him into providing the urine sample, then wrongfully tested it for evidence of drug ingestion leading to the supposed detection of marijuana and the end of his job tenure. He fashioned three statements of claim which may be paraphrased as follows:

1. The search and seizure of his urine without any previous suspicion of drug use violated the Massachusetts Civil Rights Act (MCRA), Mass. Gen. L. ch. 12, §§11H-11I by interfering with his rights to privacy and to be free from unreasonable searches and seizures, as secured by both the state and federal constitutions (Count I).

2. The seizure and testing of his urine constituted an unreasonable invasion of his privacy in violation of

Mass. Gen. L. ch. 214, § IB (Count II).

3. His dismissal was contrary to public policy and, under state law, comprised a wrongful discharge (Count III).

Contending that all of Jackson's causes of action were preempted by section 301, see supra note 1, defendant moved to dismiss the suit for failure to state any cognizable claim. Fed. R. Civ. P. 12(b)(6). After extensive briefing and argument, the district court granted the motion. This appeal ensued. In its course, Jackson waived any error in the dismissal of Count III, see Reply Brief at 15, so we need not concern ourselves with the state-law wrongful termination claim.

II. DISCUSSION

In this instance, the language of

section 301 is not, in and of itself, dispositive. Thus, in considering whether appellant's remaining claims are preempted by the statute, we must pay great heed to Congress' intent. See Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp., 108 S. Ct. 1350, 1354 (1988); Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S. 724, 738 (1985). Our task in construing the statutory language is "to interpret the words of the[] statute[] in light of the purposes Congress sought to serve." Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 608 (1979).

The Supreme Court has long recognized that the breadth of section 301 is no accident, but is commensurate with an overarching congressional purpose: to "authoriz[e] federal courts to create a

body of federal law for the enforcement of collective bargaining agreements -- 'which law the courts must fashion from the policy of our national labor laws.'" IBEW v. Hechler, 107 S. Ct. 2161, 2165 (1987) (quoting Textile Workers v. Lincoln Mills, 353 U.S. 448, 456 (1957)). The reason Congress tendered such a wide-ranging ministry to the federal courts was not only to promote the creation of a uniform body of federal labor law, but also to ensure that, when developed, the resultant rules would be applied through the grievance procedures agreed upon between unions and management. See Teamsters v. Lucas Flour Co., 369 U.S. 95, 104 (1962) (in passing section 301, "Congress intended doctrines of federal labor law uniformly to prevail over inconsistent

local rules"); Republic Steel Corp. v, Maddox, 379 U.S. 650, 653 (1964) (noting congressional approval of "contract grievance procedures as a preferred method for settling disputes and stabilizing" the common law of the plant). To the extent that judicial determination of Jackson's state-law claims would conflict with this federal scheme, those claims would be preempted by section 301 and relegated, in the first instance, to the grievance procedures available under the Agreement. See United Paperworkers International Union v. Misco Inc., 108 S. Ct. 364, 370 (1987) ("where the [labor] contract provides grievance and arbitration procedures, those procedures must first be exhausted and courts must order resort to the private settlement

mechanism without dealing with the merits of the dispute").

In Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985), the Supreme Court articulated the analytical framework within which we must determine whether Jackson's claims are preempted by section 301. There, the Court defined the scope of the statute's preemptive effect broadly, declaring that "if the policies that animate section 301 are to be given their proper range . . . the preemptive effect of section 301 must extend beyond suits alleging contract violations." Id. at 210-11. The Court itself has recently characterized the essential lesson which Lueck taught in this regard:

> . . . Lueck faithfully applied the principle of § 301 preemption developed in Lucas

> Flour: if the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law (which might lead to inconsistent results since there could be as many state-law principles as there are States) is pre-empted and federal labor-law principles -- necessarily uniform throughout the nation -- must be employed to resolve the dispute.

Lingle v. Norge Division of Magic Chef, Inc., 108 S. Ct. 1877, 1881 (1988) (footnotes omitted). Put another way, "§ 301 pre-empts state law only insofar as resolution of the state-law claim requires the interpretation of a collective-bargaining agreement. . . . " Id. at 1883 n.8. With these guideposts in place, we turn to the particulars of the case at bar.

Our preemption inquiry begins with the question Lingle requires us to ask: can Jackson's privacy claim be made out

without interpreting the Agreement? We conclude that it cannot. Because the interplay of state law, labor law, privacy concerns, and contemporary concern over drug use forms so intricate a mosaic, we take some pains to explicate our reasoning.

Massachusetts has not prohibited drug testing outright; in the Commonwealth there is no barrier to a person's free and voluntary agreement to be tested. By the same token, neither Massachusetts' constitution nor its statutory scheme accomplish proscription by indirection. Consequently, no absolute right to be free from drug testing exists, at present, under the laws of the Commonwealth. In that particular sense, then, state law creates no rights independent of the

Agreement.

The MCRA, to be sure, creates a cause of action against a private party who interferes, by coercion, with rights conferred by either the federal or state constitution. Mass. Gen. L. ch. 12, §IIH. In order to identify whether a cause of action independent of the Agreement exists under the MCRA, we must analyze the rights created by the federal and state constitutions. Only if "an established or recognized state law claim" exists, Laws v. Calmat, 852 F.2d 430, 434 n.5 (9th Cir. 1988) -- one that does not "depend[] upon the meaning of the collective-bargaining agreement, "Lingle, 108 S. Ct. at 1881 -- is the initiative saved from the preemptive web.

We look first to drug testing under

the federal Constitution. Doing so, we find it does not secure an absolute right to be free from employer drug testing. Rather, the ordinary case requires that a court attempt to calibrate the proper balance between an employee's privacy rights and an employer's legitimate concerns. See, e.g., Laws, 852 F.2d at 433-34 (upholding drug testing of drivers and other employees in building products company when management asserts rights under collective bargaining agreement to "manage the plant, direct the work force and implement safety rules," and union fails to avail itself of grievance procedure); Rushton v. Nebraska Public Power Dist., 844 F.2d 562, 566-67 (8th Cir. 1988) (upholding annual testing of nuclear power plant employees, via

urinalysis, for alcohol and narcotics based on "balancing ... the individual's legitimate expectation of privacy and personal security against the government's need for the search"); National Treasury Employees Union v. Von Raab, 816 F.2d 170, 179 (5th Cir. 1987) (upholding drug screens of customs officials by means of urinalysis as within the ambit of reasonable conditions of employment held reasonable on "ubiquitous balancing test ... entailing a weighing of the need for the search against its intrusiveness"), cert. granted, 108 S. Ct. 1072 (1988); McDonell v. Hunter, 809 F.2d 1302, 1307-09 (8th Cir. 1987) (sanctioning uniform and random drug testing of correctional officers by means of urinalysis under same balancing test); Shoemaker v.

Handel, 795 F.2d 1136, 1141-44 (3d Cir.) (upholding random urine testing of jockeys and other racetrack employees against, inter alia, fourth amendment and privacy challenges where New Jersey Racing Commission has interests that circumscribe interests of employees), cert. denied, 107 S. Ct. 577 (1986).

Similarly, the Commonwealth's constitution has never been authoritatively construed to secure such an absolute right. Nor would we expect it to be. As a general matter, state constitutional law tracks the development of federal constitutional law. In privacy law, the parallelism is pronounced. Developments in the Law - The Interpretation of State Constitutional Rights, 95 Harv. L. Rev.

1324, 1430-41 (1982). Furthermore, even when state courts depart from the federal judiciary's constitutional interpretations, they do so to further their views of the principles embodied in the federal constitution. This pattern, too, holds true in privacy law, Id. at 1442-43. We are thus loath to develop an independent innovation in state constitutional doctrine without so much as a hint from the Massachusetts Supreme Judicial Court (SJC) that such a path is open to us. Accord Laws, 852 F.2d at 434 n.5 (Ninth Circuit requires "an established or recognized state law claim"). Nonetheless, while we are bound only by the actual expression of the state's highest court, Commissioner of Internal Revenue v. Bosch, 387 U.S. 456, 465 (1966), we may look broadly for

guidance in order to establish how the SJC would likely decide the issue. See Redgrave v. Boston Symphony Orchestra, Inc., 855 F.2d 888, 903 (1st Cir. 1988) (en banc) (federal court may examine analogous decisions, considered dicta, scholarship and other reliable data to divine state law); Moores v. Greenberg, 834 F.2d 1105, 1107 (1st Cir. 1987) (similar). "In the process [the federal court] may 'reasonably assume that [the state court] will follow the rule that appears best to effectuate' relevant policies." Id. (quoting Bowen v. United States, 570 F.2d 1311,1322 (7th Cir. 1978)).

Here, such hints as exist suggest that the SJC will not recognize an absolute right. In addition to the general predilection for parallelism,

see supra, the Commonwealth's overall approach to privacy concerns argues forcibly against the creation of an inalienable right. Although we have looked long and hard, we have been unable to discern even so much as a policy or trend favoring the establishment of such a right.

In Massachusetts, privacy concerns are most clearly embodied in a right-to-privacy statute, Mass. Gen. L. ch. 214, §IB. The statute, and the cases decided under it, suggest that Massachusetts views the right to privacy in traditional terms. The SJC has opted for balancing that is reminiscent of, if not identical to, the conventional federal approach on the constitutional question. Bratt v. International Business Machines Corp., 467 N.E.2d 126

(Mass. 1984) is illustrative. That case involved an employer's disclosure of personal information concerning an employee, alleged to be violative of §IB as an unreasonable interference with the latter's right of privacy. The SJC ruled that: "In determining whether there is " violation of §1B, it is necessary to balance the employer's legitimate business interest in obtaining and publishing the information against the substantiality of the intrusion on the employee's privacy resulting from the disclosure." Id. at 135-36. The SJC also noted that the balancing test would apply even if medical information were involved. Id. at 129, 136 & n.20.

Because Jackson has alleged a statutory claim, and because the

statutory interpretation provides us with the strongest, clearest, most recent, and most reliable data concerning the SJC's approach to privacy, we elaborate in some detail. The statute "proscribes only unreasonable interferences with a person's privacy [and] legitimate countervailing business interests in certain situations may render the disclosure of personal information reasonable and not actionable under the statute." Id. at 135 (citations omitted). Interfering with privacy has two components under Massachusetts law: obtaining information and disclosing it. Both are relevant to drug testing. Procuring information may be an interference with a person's privacy. And while "there may be inquiries of a

personal nature that are unreasonably intrusive and no business of the employer and . . . an employee may not be discharged with impunity for failure to answer such requests," id. at 135 (quoting Cort v. Bristol-Myers Co., 431 N.E. 2d 908, 912 n.9 (Mass. 1982)), the SJC appears to believe that the most important test of the reasonableness of an intrusion is whether "an employer is prohibited from seeking certain personal data from an employee or a prospective employee." Bratt, 467 N.E. 2d at 135 n.17 (using as examples inquiries prohibited under state statutes). See also Cort, 431 N.E. 2d at 912-14. The Commonwealth, as of this time, has no statutory prohibition against drug testing.

To be sure, the absence of a state

statute is not dispositive of the point. An actionable intrusion, as defined by the SJC, still depends in part on the interest of the employer. But that is of scant solace to appellant. We cannot say, as a categorical matter, that an employee's drug use, at least insofar as it may have an impact on an employee's work, Pratt, 467 N.E 2d at 133, 135 & n.18, is "no business of the employer." To strike so extreme a stance would be to exercise an unconscionable and willful blindness to the realities of contemporary life. Unable to find, then, that employers have no legitimate interest in an employee's drug use, we are thrown back to the reasonableness inquiry. That inquiry is, of course, little more than a shorthand description of the balancing test.

Before leaving the precincts of state law, we take one further step. Because Jackson has pled a statutory claim, and because we find that statutory analysis so valuable to the larger inquiry, we do not limit ourselves to the legal propriety of the employer's attempt to collect information about employee drug use through drug testing, but pursue the second aspect of a privacy claim as well -- disclosure of private information. While we need not dwell unduly on this facet of a privacy claim, we note that Massachusetts interprets publication broadly: "the disclosure of private facts about an employee among other employees in the same corporation can constitute sufficient publication under the Massachusetts right of privacy statute." Bratt, 467 N.E.2d at 134. To

the extent that L-Corp's testing plan contemplates shring the results of the tests with managerial personnel, even if only for the purpose of terminating the employment of a worker who fails the tests, it also implicates this statutorily protected area of privacy. Once again, however, whether the plan thus violates an employee's privacy right depends upon a balancing of the various factors inherent in the situation in order to determine if publication is reasonable. Id. at 134-35.

While we do not doubt that the SJC would give sharp scrutiny to drug-testing programs, we are equally confident that Massachusetts, in interpreting its own constitution and statutes, would view the collective

bargaining process as an appropriate datum in constructing the needed balance between the worker's privacy rights and the legitimate concerns of management. Accord Laws, 852 F.2d at 433, 434 n.5; Utility Workers of America, Local 246 v. Southern California Edison Co., 852 F.2d 1083, 1086 (9th Cir. 1988).[3]

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[3] Our dissenting brother credits us with a longer reach than we essay. We neither "prejudge the issue of what constitutes the elements of a state privacy law claim," post at 32, nor "proscribe[] the possibility that the state might mandate privacy laws which are independent of . . . a collective bargaining agreement." Id. at 33. We merely hold that, if such a claim exists in Jackson's case, it is based on rights secured by that Agreement and must be pursued, therefore, only in the arbitral forum. L-Corp's drug-testing plan compromises no independent, bedrock, state-law right, presently established, which would allow analysis of the Agreement to be foregone. The commonwealth, of course, remains free to create such a right, either by enacting a sufficiently explicit statute or by a sufficiently pointed judicial explication of such a right. But as matters now stand, neither the

Where, as here, state law does not create a right that is, on its own terms, clearly independent of a collective bargaining agreement, we must, in conducting a preemption inquiry, look to the possibility that a right may nonetheless be independent. Lingle, 108 S.Ct. at 1882. Yet if the "pertinent principles of state law require[] construing the relevant collective-bargaining agreement," section 301 preempts the state law claim. Id. at 1882 n.7. The question

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Massachusetts legislature nor the SJC lead us in that direction. See text supra. If this approach "put[s] the cart before the horse," post at 33 - and we do not believe that is so - it is only because the horse has not yet emerged from the stable.

for this court, therefore, reduces to whether the balance of interests as between Jackson and L-Corp necessarily implicates the Agreement in some substantial sense. We think that it does; Jackson's claimed right to privacy is enmeshed in the collective bargaining pact.

A right subject to a balance involving the needs and interests of the parties is, almost of necessity, defined by the parties themselves. As this circuit has previously recognized, privacy rights in the Massachusetts workplace are affected by a firm's own regulations. Bratt v. International Business Machines Corp., 785 F.2d 352, 350-61 (1st Cir. 1986) (internal company regulations may enhance employee expectation of privacy; applying

Massachusetts law). In this case, where the only legitimate outlet for managerial regulations which may affect the continued employment and working conditions of the employees is the management rights clause of the Agreement, the putative state-law claim must look to the rights defined under its auspices. In fact, the state-law claim is "inextricably intertwined with consideration of the terms of the labor contract." Lueck, 471 U.S. at 213.

To illustrate the nature of the symbiosis, we look to the particular state-law claim asserted by Lueck who decried his employer's handling of insurance claims tortiously and in bad faith. The collective bargaining agreement which was in force dealt specifically with the administration of

insurance claims. Moreover, "under [state] law, it appears that the parties to an insurance contract [were] free to bargain about what 'reasonable' performance of their contract obligation entails." Lueck, 471 U.S. at 217. This being so, the Court concluded that plaintiff's tort claim was bound up with the collective bargaining pact, that is, the claim was "firmly rooted in the expectations of the parties that must be evaluated by federal contract law." Id. While "section 301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law," id. at 212, that dictum pertains to "state rules that proscribe conduct, or establish rights and obligations independent of a labor contract." Id.

(footnote omitted). Where, as in the instant case, a right is one involving a balancing of the parties' interests defined in part by a labor contract, the Court has been quick to recognize a different standard. If state-law rights and obligations do not necessarily "exist independently of private agreements," they "can be waived or altered by agreement of private parties. . . . " Id. at 213. And to that extent, they can be, and are, preempted by the protective gloss which section 301 provides to those agreements. Id.

With this frame of reference in place, we address the particular features of the case before us. As we have stated, Jackson's privacy claims do not rest upon inalienable state-law rights which float free of, and therefore

do not require interpreting, the collective bargaining agreement. They are not necessarily independent of the labor contract. On the contrary, those claims can only, we believe, be resolved by scrutinizing and evaluating the explicit powers granted to management under the Agreement. After all, in the earlier bargaining, the union ceded to L-Corp the authority to conduct "required" physical examinations and to "post reasonable rules and regulations." See supra. In determining whether the drug test to which Jackson was subjected infringed his right to privacy under state law (or under the federal Constitution, for that matter), the single most important consideration is whether the testing was "reasonable" in light of the circumstances then

obtaining. See O'Connor v. Ortega, 107 S. Ct. 1492, 1497 (1987) (plurality opinion) ("the reasonableness of an expectation of privacy, as well as the appropriate standard for a search, is understood to differ according to context"); Rushton, 844 F.2d at 566 ("reasonableness of a search depends on the context"). The Fourth Amendment mandates, for example, that a search by public school authorities falls within a classic context altered by the circumstances, arraying the student's bona fide expectations of privacy and personal security against the government's need to police "breaches of public order." New Jersey v. T.L.O., 469 U.S. 325, 887 (1985). Similarly, except for independent exogenous rights, the collective bargaining agreement

classically provides the context in which an employee's bona fide expectations of privacy and personal security in the workplace are arrayed against the employer's right to exercise supervision and control of a particular kind. In that context, reasonableness almost always requires investigation of the terms of the collective bargaining agreement.

Evaluating the legitimacy of the drug-testing policy requires a similar safari in search of reasonableness. See Kelley v. Schlumberger Technology Corp., 849 F.2d 41, 45 (1st Cir. 1988) (reasonableness of company's implementation of drug-testing policy to be judged by "possibilities apparent" at the time). In that inquiry, too, context is vitally important. Article

XXI of the Agreement does not allow L-Corp to issue regulations at will or on whim, but limits the employer's prerogative to the promulgation of "reasonable" rules and regulations. To determine whether that boundary has been observed, the logical starting place is a consideration of how the Agreement allocates the twigs which make up the aggregate of workplace rights into a management bundle and an employee bundle. At the bottom line, the propriety of L-Corp's drug-testing program must be assessed in light of the practices and exigencies of the industry, factors which are routinely considered when interpreting a collective bargaining agreement. See, e.g., United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581-

82 (1960) ("the practice[] of the industry and the shop . . . is equally a part of the collective bargaining agreement although not expressed in it"); Maine Central R. Co. v. United Transportation Union, 787 F.2d 780, 782 (1st Cir.) (similar), cert. denied, 107 S.Ct. 169 (1986)

Bathed in this glow, the underlying issues raised by Jackson's privacy claims appear inseparable from an interpretation of what is or is not "reasonable" under the labor contract. Put another way, the dimensions of appellant's cognizable expectation of privacy depend to a great extent upon the concessions the union made regarding working conditions during collective bargaining. If the Agreement allowed L-Corp, as part of the "required" medical examination, to

demand that workers assent to the additional laboratory analysis of urine specimens, and L-Corp did no more than exercise this contractual prerogative, then the rationality of Jackson's asserted expectation of urologic privacy would be diminished accordingly. Only by probing the contours of the Agreement can one answer whether the program was legitimately implemented under the auspices of Article XXI (the management rights clause). And Article XII (the arbitration clause) provides the only appropriate vehicle for conducting that examination. In short, assessment of Jackson's allegations necessarily involves an in-depth inquiry into the rights and obligations bestowed by the Agreement.[4] Jackson's privacy claims

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4 Plaintiff's search-and seizure claim

can only be resolved by deciding whether the employer's conduct was "reasonable" under the labor contract, taking into account the "expectations of the parties." Lueck, 471 U.S. at 217. This, the caselaw teaches, is quintessentially a matter of federal law. See, e.g., Lingle, 108 S.Ct. at 1881.

Our conclusion that Jackson's privacy claims are both negotiable and bound up

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requires no separate analysis. The fourth amendment bans not all searches and seizures, but only unreasonable ones. New Jersey v. T.L.O., 449 U.S. at 340-41. The Massachusetts constitution affords no greater protection. Inasmuch as "[t]he determination of fourth-amendment reasonableness requires consideration of the totality of the circumstances in a particular case," Von Raab, 816 F.2d at 177, the inquiry is, on this point, identical to that which must be undertaken on the more broadly phased privacy claims.

in the interstices of the Agreement -- and thus preempted -- is reinforced by the recent decision in Utility Workers. There, plaintiffs claimed that the employer's drug-testing program violated privacy rights secured to them under the California constitution. The Ninth Circuit held the claims to be preempted under section 301. Judge Goodwin wrote that:

> [Plaintiffs'] constitutional claims are "substantially dependent" upon the analysis of the collective bargaining agreement and they constitute a properly negotiable subject for purposes of collective bargaining. Resolution of the issue whether [the Union] has bargained away its members' claimed constitutional rights must rest upon [provisions] of the collective bargaining agreement, which recognize [the employer's] right to manage the plant, to direct the working force, and to implement reasonable safety rules and require their observance.

Id. at 1086 (quoting Lueck, 471 U.S. at 220). In much the same way, because Jackson's claims can be resolved only by interpreting the meaning and scope of Articles IX and XXI of the Agreement in order to gauge the propriety of L-Corp's implementation of a drug-testing policy, section 301 preempts them. Here, the labor/management environment is dominated by a sweeping management rights clause. We are not permitted to ignore a negotiated provision of a collective-bargaining agreement merely because of its familiarity or breadth. Such clauses, whatever pejorative labels may be bandied about, are legitimate. See NLRB v. American National Insurance Co., 343 U.S. 395, 404-09 (1952). Our duty in this case is to simply decide whether the clause must be studied in

order to make out the privacy claim. Accord Utility Workers, 852 F.2d at 1086. Like the district court, we believe that it must.

In this instance, the management rights clause is broad enough that an arbitrator could easily resolve a drug-testing dispute between Jackson and L-Corp based on rights asserted by the latter under the clause. See S.D. Warren Co. v. United Paperworkers Int'l Union, 845 F.2d 3, 7-8 (1st Cir. 1988); S.D. Warren Co. v. United Paperworkers Int'l Union, 846 F.2d 827, 831-33 (1st Cir. 1988) (Coffin, J., concurring). For a rule promulgated under such a clause to be considered reasonable, it need only "be related to some legitimate business interest." M. Hill and A. Sinicropi, Management Rights

71 (1986). At the very least, the drug testing edict falls colorably within this rubric. E.g. . Association of Western Pulp and Paper Workers v. Boise Cascade, 644 F. Supp. 183, 186 (D. Or. 1986).

Then too, "[a] drug and alcohol testing program, upon which all employees' continued employment depends, is a working condition whether or not it is specifically discussed in the [collective bargaining agreement]." Laws, 852 F.2d at 433. A working condition, of course, is a mandatory subject of bargaining and, when it presents a question upon "which the parties disagree," it "must ... come within the scope of the grievance and arbitration provisions of the collective agreement." United

Steelworkers, 363 U.S. at 581.

In sum, we believe that, as a union member, Jackson was obligated to grieve -- not sue -- because, under state law, Massachusetts would look to the Agreement to discern the scope of the privacy right which he was attempting to assert. See supra. Because L-Corp, by resorting to the clause, purported not implausibly to exercise its legitimate business interest in its employees' capacity to perform their work well and safely, see Bratt, 467 N.E.2d at 133, 135 & n.18, and did so under the auspices of the Agreement, Jackson's state-law claim was preempted under section 301.

Although the authorities are not uniform, other courts have also found claims that employers' drug-testing

programs violated state tort laws to be preempted by section 301 because of the degree of imbrication between the claims and the collective bargaining agreements in force. For example, in Strachan v. Union Oil Co., 768 F.2d 703 (5th Cir. 1985), the Fifth Circuit ruled that challenged drug tests fell squarely within the scope of the company's "power ... under the collective bargaining agreement to insist upon medical examinations...." Id. at 704. Such claims were termed "grist for the mill of grievance procedures and arbitration." Id. at 705. See also Laws, 852 F.2d at 434; Boise Cascade, 644 F. Supp. at 186 (claim that drug-testing program violated state tort law preempted because it necessitated interpretation of contract provisions

allowing management to "institute reasonable work rules").

While finding preemption appropriate in this case, we hasten to point out that section 301 does not swallow up claims which bear only peripheral relation to the terms of a labor contract. See Lueck, 471 U.S. at 211 ("not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is preempted by § 301 or other provisions of the federal labor law"). In Lingle, the Supreme Court recently clarified the limits of section 301's preemptive force. There, the Court held plaintiff's claim that her former employer violated a state prohibition against retaliatory discharge not preempted, despite the

existence of a collective bargaining agreement affording a contractual remedy for discharge without just cause. 108 S. Ct. at 1829. Id. The Court explained that merely because a state-law claim "would require addressing precisely the same set of facts" as a cognizable grievance under a collective bargaining agreement, preemption did not automatically attach. Id. at 1883.

We learn from Lingle that where the state-law claim is substantially separate from, and will not require appreciable interpretation of, the labor contract in the course of its adjudication, no purpose would be served by a federal bar. In Lingle, for example, the Court noted that "even if an arbitrator should conclude that the contract does not prohibit a particular

discriminatory or retaliatory discharge, that conclusion might or might not be consistent with a proper interpretation of state law." Id. at 1885. Because the just cause provision and the state-sponsored protection against retaliatory discharge were not coterminous, the state-law cause of action was independently maintainable. Id. But Lingle does not drive the wedge so broadly as to embrace instances where the measure of the state claim must be sized in some significant part by reference to the collective bargaining pact. The reverse is true; Justice Stevens explicitly reaffirmed the bedrock principle of section 301 preemption and the cornerstone of Lueck, writing that: "as long as the state-law claim can be resolved without

interpreting the agreement itself, the claim is 'independent' of the agreement for § 301 preemption purposes." Id. at 1883 (footnote omitted).

The case before us, of course, is a mirror image of Lingle, because there is no way to assess the state-law tort claims pleaded here without taking account of the Agreement. Unlike the retaliatory discharge initiative in Lingle, Jackson's privacy claims do not merely overlap to some ill-fitting degree with rules established under the labor contract. The central thesis of his suit questions whether L-Corp's drug-testing protocol was reasonable. That thesis demands definitive interpretation of the Agreement as a prerequisite to any attempt to formulate a reasoned response. Inasmuch as the

expectations of both management and labor comprise crucial aspect of the reasonableness inquiry, see O'Connor, 107 S. Ct. at 1498 (plurality opinion), the Agreement, properly construed, is likely to dictate the result of Jackson's state-law claims. Whereas the retaliatory discharge claim in Lingle was distinct and separate from the just cause provision of the collective bargaining pact, the asserted invasion of Jackson's privacy centers on, and is inextricably intertwined in, the reasonableness of drug testing.

Given the integers that must be factored into the calculation of reasonableness, we do not see how, under state law, the Agreement can be omitted from the equation. Though we intimate no view of where the balance may be

struck in Jackson's case or any other, we find insufficient justification for imposing by judicial fiat a rigid limitation on the give-and-take of the collective bargaining process which would entirely remove the possibility of drug testing from the labor/management agenda. If the equation is to be accurate, it must prominently feature the labor pact and its due construction. The sum total, therefore, adds up to preemption.

III. CONCLUSION

We are mindful of the need to "preserve [] the central role of arbitration in our 'system of industrial self-government'". Lueck, 471 U.S. at 219 (quoting Warrior & Gulf 363 U.S. at 581). As the Court has declared: "The ordering and adjusting of competing

interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace." Lucas Flour, 369 U.S. at 103-04. Grievance and arbitration are important cogs in the machinery. See Misco, 108 S. Ct. at 371 ("it must be remembered that grievance and arbitration procedures are part and parcel of the ongoing process of collective bargaining"). A plaintiff should not be allowed to bypass the grievance procedures established by the labor contract in a case where his claims are so clearly dependent on interpretation of the terms of that contract. Allowing such an end run would surely undermine the structure of industrial self-government.

We need go no further. Because

resolution of Jackson's state-law claims "requires the interpretation of a collective bargaining contract," Lingle, 108 S. Ct. at 1883 n.8, it follows inexorably, as night unto day, that section 301 preempts maintenance of the suit in its present form.

Affirmed.

-- Dissent follows --

BOWNES, Circuit Judge, (dissenting). In this case, an employee was subjected to random drug testing by his employer as a condition for continued employment. The results from his urinalysis test were positive for the presence of traces of marijuana, and the employee, despite his denial of marijuana use and his request for an independent drug test, was summarily fired from his job. The issue before this court is whether the

employee has a state law claim under the Massachusetts Civil Rights Act or other state statutes for invasion of privacy, or whether any such state law claim is preempted by § 301 pursuant to the collective-bargaining agreement in existence between the employer and employees at the time of the testing.

The decision in Lingle v. Norge Division of Magic Chef, 108 S. Ct. 1877 (1988), is controlling. In that case, a state claim for retaliatory discharge was held not to be preempted by § 301, even though there was a collective bargaining agreement provision prohibiting discharge without just cause. The Court held that "an application of state law is pre-empted by § 301 of the Labor Management Relations Act of 1947 only if such

application requires the interpretation of a collective bargaining-agreement." Id. at 1885 (emphasis added). Since the retaliatory discharge claim did not turn on the meaning of any provision of the collective-bargaining agreement, the state law remedy was thus "independent" of the collective bargaining agreement. Id. at 1882.

This analysis was also followed in Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985), where the Court stated that "[i]n extending the pre-emptive effect of § 301 beyond suits for breach of contract, it would be inconsistent with congressional intent . . . to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract." Id. at 212 (emphasis added). Section 301

preempts only those state law claims that are "inextricably intertwined with consideration of the terms of the labor contract." Id. at 213.

In the instant case, there is nothing in the collective-bargaining agreement which even remotely deals with the subject of drug testing or privacy rights. The majority therefore uses the broad general management rights clause giving the employer "the right to post reasonable rules and regulations from time to time" as the wedge to implicate the collective-bargaining agreement. It then bootstraps itself to the finding that the state law claim is necessarily "inextricably intertwined" with the broad labor contract clause. To conclude, however, that such a general clause mandates interpretation of the

collective-bargaining agreement when assessing the applicability of a state privacy law claim, is to prejudge the issue of what constitutes the elements of a state privacy law claim. There is no authority for an analysis in which the federal court hypothesizes how the state court would determine what the parameters of its own privacy laws are, and then, based on that guess, effectively precludes the state court from ever making its own determination on the matter by declaring that the issue so determined is preempted by federal law. This approach is to put the cart before the horse.

The majority has, in effect, proscribed the possibility that the state might mandate privacy laws which are independent of a broad general

management rights clause in a collective-bargaining agreement. Such a conclusion is unwarranted -- there is nothing to prohibit a state from enacting a law which would create an independent right to be free from random drug testing. And indeed, the Massachusetts Civil Rights Act may encompass such a right, or it may not. But until the Massachusetts court speaks, we do not know, and there is no need to guess. It is simply unsupported to maintain, as the majority does, that the application of the Massachusetts state privacy law "requires the interpretation of [the] collective-bargaining agreement," Lingle, 108 S. Ct. at 1885, and is therefore preempted. The majority's approach would make a nullity of any independent privacy rights established

by the states. This result, moreover, is in direct conflict with the pronouncements of the Supreme Court, which have not only recognized the existence of state (and federal) rights which are independent of the collective-bargaining agreement, but have steadfastly protected such rights from preemption. As Lingle states:

> [T]here is nothing novel about recognizing that substantive rights in the labor relations context can exist without interpreting collective-bargaining agreements. . . ."[N]ot withstanding the strong policies encouraging arbitration, different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.' Barrentine, supra, 450 U.S. at 737 [101 S. Ct. at 1443]." Atchison, T. and S.F.R. Co., v. Buell, 480 U.S. __, __, 107 S. Ct. 1410, 1415 (emphasis added).

Lingle, 108 S. Ct. at 1884. See also, Fort Halifax Packing Co. v. Coyne, 482 U.S. 107 S. Ct. 2211, 2223 (1987) (federal labor law does not preempt a state law providing a one-time severance payment to employees in the event of a plant closing "since [the state law's] establishment of a minimum labor standard does not impermissibly intrude upon the collective-bargaining process").

Thus, the issue is not, as the majority states, whether random drug testing by an employer is reasonable under the collective-bargaining agreement, but rather, whether it is prohibited by the Massachusetts Civil Rights Act or other state laws. Resolution of this question does not require interpretation of any provisions in the collective-bargaining agreement;

what it does require is a decision as to the scope of the state law. Therefore, following Lingle, the state law claims in the instant case are not preempted by § 301. Indeed, if anything, the issue in the instant case (independence of invasion of privacy claims from "reasonable regulation" provision in the collective-bargaining agreement) is even more compelling for this conclusion than the issue in Lingle itself (independence of state retaliatory discharge claim from "just cause" discharge provision in the collective-bargaining agreement).

The Massachusetts court should be permitted to make its own determination as to the existence or non-existence of a privacy right to be free from random drug testing based on its interpretation of Massachusetts law. This

determination can only be made independently of the broad general management rights clause in the collective-bargaining agreement. Whether the employer's drug testing regulations are reasonable regulations, from either the employer's or employee's perspective, is not relevant to whether the Massachusetts Civil Rights Act independently establishes a privacy right to be free from mandatory random drug testing. It is for the Massachusetts courts to make this determination. The Massachusetts courts may or may not find that such a privacy right exists under Massachusetts law, but we should not predict, as the majority has done with such confidence, what the Massachusetts courts will decide.

It should be noted that in Lingle, Illinois had a clearly defined state tort of retaliatory discharge, and in the instant case, no such clearly defined state law covering privacy rights has yet been articulated by the state courts. This difference, however, provides even more reason for permitting the state courts to decide in the first instance the breadth of privacy rights under state law.

It must also be pointed out that while a central underpinning of the majority's opinion is that random drug testing is not per se unconstitutional, this question is far from settled. The Supreme Court has not yet made any determination on this, the circuit courts are not in agreement, and the Massachusetts courts have not made any

definitive pronouncement. Indeed, there are at least two cases currently before the Supreme Court challenging employee drug testing programs which are considerably more limited in scope, in terms of the circumstances under which such programs are required, than the instant case of mandatory random drug testing. See Burnley v. Railway Labor Executives' Association, No. 87-1555 (argued 11/2/88) (appeal of Ninth Circuit ruling which held unconstitutional a Federal Railroad Administration drug testing program for railway employees who are involved in an accident because it does not require particularized suspicion or impairment prior to testing); National Treasury Employees Union v. Von Raab, No. 86-1879 (argued 11/2/88) (appeal of Fifth

Circuit ruling which upheld a Customs Service drug testing program that requires employees who seek certain job promotions to submit to urine sampling). There are also other cases surfacing which challenge the constitutionality of random drug testing. Moreover, the Massachusetts Civil Rights Act may well be interpreted by the Massachusetts courts to confer greater rights in this area than the federal Constitution does. By using the preemption doctrine, the majority is impliedly deciding for the Massachusetts courts that there is no independent privacy right to be free from random drug testing. This is an unwarranted conclusion at this juncture.

The majority has, in my judgment, erred in two respects: (i) in declaring on its own that the Massachusetts Civil

Rights Act encompasses a privacy right which is limited by the reasonableness of the employer's random drug testing program without first permitting the Massachusetts courts to interpret the parameters of its own laws, and effectively foreclosing such a state determination by declaring the issue preempted; and (ii) in declaring that once the Massachusetts Civil Rights Act is so construed, interpretation of the general management rights clause is required to determine the reasonableness of the random drug testing. The scope of the Massachusetts privacy right has not yet been articulated, and it is unwarranted to conclude that interpretation of the broad general management rights clause is required to determine the application of the state

law. Lingle mandates that § 301 does not preempt the state law claim in the instant case.

The case should be remanded to the state court for a determination of the state law claims.

I respectfully dissent.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 87-0095-Z

GEORGE JACKSON

vs.

LIQUID CARBONIC CORPORATION

MEMORANDUM OF DECISION

ZOBEL, D.J.

Plaintiff, a truck driver, was employed by defendant from 1976 until January 1986 when he was discharged after testing positive for marijuana use. He filed suit in Middlesex County Superior Court on December 16, 1986, seeking reinstatement, an injunction barring further drug testing, and compensatory damages based on theories of state tort law, the state privacy statute, M.G.L. ch.214, §IB (1986) and the state civil rights statute, M.G.L. §11H, 11I (1986). Defendant removed the case to this Court

asserting both federal question jurisdiction and diversity of citizenship.[1]

Now before me is defendant's motion for summary judgment on the ground that plaintiff's claims are pre-empted by federal law.[2] For the reasons set out below, the motion is allowed.

As a preliminary matter, plaintiff has moved to strike the factual allegations contained in paras. 5-16 of the affidavit

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[1] Because diversity of citizenship presents an independent basis of jurisdiction, I need not consider application to this case of the "complete pre-emption" doctrine. Caterpillar, Inc. v. Williams, ___U.S.___, 107 S.Ct. 2425 (1987).

[2] Defendant originally filed a Rule 12(b)(6) motion to dismiss the complaint on the pleadings. By submitting the affidavit of Melvin Dashevsky, defendant's motion became one for summary judgment under Rule 12(c). King v. Williams, 565 F.Supp. 321, 322-3 (D.Mass. 1983), aff'd, 724 F.2d 240 (1st Cir.), cert. denied, 466 U.S. 980 (1984).

of Melvin Dashevsky who was, at the relevant time, defendant's Northeast Operations Manager. The affidavit describes the genesis of the drug testing program, its relationship to the collective bargaining agreement between defendant and Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 49 ("Local 49"), and what occurred with respect to plaintiff's discharge. Plaintiff does not dispute the accuracy of Dashevsky's statements, only their relevance. Because the collective-bargaining agreement is central to the resolution of this case, United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 U.S. 574, 581-82 (1960), the motion to strike is denied. From the allegations of the complaint and the undisputed facts contained in the

Dashevsky affidavit (and attachments), the following scenario emerges. Plaintiff, while in defendant's employ, was a member of a collective-bargaining unit represented by Local 49. At the time of plaintiff's discharge, defendant and Local 49 were parties to a collective-bargaining agreement ("the Agreement").

In January 1986, when plaintiff reported for a physical examination required by defendant and the United States Department of Transportation, he was also required to supply a urine sample for drug testing. Before the January 1986 test, plaintiff had compiled a nine-year record of satisfactory work for defendant, free of any disciplinary action. At the time of the test, defendant had no reason to believe that

plaintiff was a drug user. Indeed, plaintiff has never ingested marijuana. Further, the testing procedures were flawed, as the samples were inadequately labeled.

On February 13, 1986, defendant notified plaintiff that he was suspended without pay pending further investigation of the drug test results. One week later, defendant discharged plaintiff because on retesting the urinalysis again indicated marijuana use. Plaintiff's request for an independent drug test was refused. After his discharge, plaintiff was unemployed for six months. He, of course, lost income and suffered emotional distress from both his unemployment and the events leading up to it.

Article XIII of the Agreement

prohibits defendant from discharging or suspending employees except for just cause, and Article XII outlines the grievance procedure for employee claims of wrongful suspension or discharge, culminating in arbitration, if necessary. Plaintiff apparently did not file a grievance or complaint.[3] Shortly after his discharge, however, two union representatives and plaintiff met with officials of defendant and discussed his termination. No further action was taken.

The complaint is premised on three theories. The first claim is under the Massachusetts Civil Rights Statute,

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[3] Nor does plaintiff rely on any alleged waiver of the collective-bargaining processes by employer misconduct or breach by the union of its duty of fair representation. See Hayes v. New England Millwork Distributors, 602 F.2d 15 (1st Cir. 1979).

M.G.L. ch. 12 §§11H, 11I for violation of plaintiff's civil rights to be free from unreasonable searches and seizures under the state and federal constitutions. Plaintiff's second claim is for violation of M.G.L. ch. 214 §IB, the privacy statute, and the third for wrongful termination in violation of public policy.

Defendant contends that, stripped to their essentials, all of plaintiff's claims reduce to wrongful discharge, that this is covered by the collective-bargaining agreement, and that the exclusive remedy for breach of that agreement is under Section 301 of the Labor Management Relations Act, 29 U.S.C. 185 (1982). Plaintiff disputes neither the assertion that the Agreement provides remedies for wrongful discharge nor that

federal law provides the exclusive remedy for breach of the Agreement. He asserts simply that his claims, founded on state common and statutory law, as well as the state and federal constitutions, are independent of any contractual terms in the collective-bargaining agreement.

"The law is completely clear that employees may not resort to state tort or contract claims in substitution for their rights under the grievance procedures in a collective-bargaining agreement." Strachan v. Union Oil Co., 768 F.2d 703, 704 (5th Cir. 1985). The test is whether the tort action "confers nonnegotiable state law rights on employers or employees independent of any right established by contract, or, instead, whether evaluation of the tort claim is inextricably intertwined with

consideration of the terms of the labor contract." Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 213 (1985).

Plaintiff describes the wrongful discharge count as a tort claim independent of the contract embodied in the Agreement. Because the Agreement explicitly prohibits defendant from firing employees except for just cause, the wrongful discharge claim is, in essence, that defendant violated its obligation under the Agreement and that complaint may be presented only under §301.

See Bertrand v. Quincy Market Cold Storage & Warehouse, 728 F.2d 568 (1st Cir. 1984) (employee claim of wrongful discharge is pre-empted by §301, despite plaintiff's pleading of state law tort of breach of implied covenant of good faith

and fair dealing); Ether v. Amoco Oil Co., No. 86-C-9841 (N.D. Ill. March 30, 1987) (Westlaw, Allfeds database) (claim for wrongful discharge based on firing after positive drug test in violation of company policy encompassed in "just cause" provision of contract and therefore within §301).

Plaintiff's first and second theories are premised on his complaint that defendant's "conduct" interfered with his constitutionally (state and federal) and statutorily protected right to privacy. The only "conduct" alleged is the institution of the particular drug testing program,[4] the coercive testing of plaintiff pursuant thereto, and his discharge based on the test results. All

---

[4] I do not read the complaint to assert that plaintiff's right to privacy precludes the promulgation of any drug testing program.

aspects of such conduct are encompassed within and circumscribed by the Agreement. The Agreement contemplates that employees will undergo periodic physical examinations. Article IX(e) provides for payment thereof by defendant and for payment of wages to the employee for time spent at such examination. It is undisputed that defendant in March 1985 promulgated a rule, called Transportation Bulletin I-13, which required that each company driver be tested for drug and alcohol abuse as part of this periodic physical examination. Plaintiff in his complaint acknowledges that he was informed of the policy and that he signed a consent to urine testing, albeit under duress. Under Article XXI(2) defendant has the right to post reasonable rules and regulations

from time to time which shall not in any way conflict with any of the provisions of this Agreement." The drug testing requirement is a "rule and regulation" within the meaning of Article XXI and plaintiff has pointed to no conflict between it and any other provisions of the Agreement, and I have discerned none. Plaintiff does not challenge the right of defendant to institute a drug testing program. Instead, he claims the right not to be subjected to testing in the manner directed by defendant, i.e., under threat of loss of job and without probable cause or, at least, suspicion. Plaintiff thus concedes that the particulars of defendant's drug testing program were negotiable. See Allis-Chalmers, 471 U.S. at 213. In essence, then, plaintiff alleges that the rule

requiring testing was not "reasonable" within the meaning of the contract.

Article XII establishes a procedure for processing "any grievance involving the meaning, application or interpretation of the provisions of [the] Agreement." This clause is unquestionably broad enough to include a challenge to the reasonableness of defendant's drug rule. See Kirby v. Allegheny Beverage Corp., 811 F.2d 253, 256 (4th Cir. 1987).

The first and second claim must, therefore, proceed initially in accordance with the terms of the contract and eventually under §301. See Allis-Chalmers Corp. v. Lueck, 471 U.S. at 219-20. Accord Utility Workers Union of America, Local No. 246, AFL-CIO v. Southern California Edison Co., CV 86-

8250-HLH (TX) slip. op. (C.D. Cal. Feb. 11, 1987) (claim for violation of state ccnstitutional right to privacy and to be free from unreasonable searches and seizures under employer's random drug testing program pre-empted); Association of Western Pulp and Paper Workers v. Boise Cascade Corp., 644 F.Supp. 183 (D. Or. 1986) (state cause of action for violation of privacy under employer's drug testing program not independent of collective-bargaining agreement).

Defendant's motion for summary judgment is allowed. Judgment may be entered for defendant.

October 30, 1987

Rya W. Zobel, District Judge.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 87-2073

GEORGE JACKSON,
Plaintiff, Appellant,
v.
LIQUID CARBONIC CORP., ET AL.,
Defendants, Appellees.

JUDGMENT

December 1, 1988

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:
Francis P. Scigliano
Clerk.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 87-2073

GEORGE JACKSON,
Plaintiff, Appellant,

v.

LIQUID CARBONIC CORP., ET AL.,
Defendants, Appellees.

Before

Coffin, Bownes and Selya, Circuit Judges

ORDER OF COURT

Entered: December 29, 1988

Upon consideration of appellant's petition for rehearing,

It is ordered that said petition for rehearing be denied.

Paragraph two, line 4 of the slip opinion on page 22 beginning with the word "Put" and ending with the word "away" is amended to read as follows:

> "Put another way, the dimensions of appellant's cognizable expectation of privacy depend to a great extent upon the concessions the union made regarding working conditions during collective bargaining".

By the Court:
Francis P. Scigliano, Clerk

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 87-2073

GEORGE JACKSON,
Plaintiff, Appellant,

v.

LIQUID CARBONIC CORP., ET AL.,
Defendants, Appellees

Before

Campbell, Chief Judge,

Coffin, Bownes, Breyer, Torruella and Selya, Circuit Judges

ORDER OF COURT
Entered: December 29, 1988

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the suggestion for a rehearing en banc be denied.

By the Court:
Francis P. Scigliano
Clerk.

Supreme Court, U.S.
FILED
MAY 18 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1586.

In the
Supreme Court of the United States.

OCTOBER TERM, 1988.

GEORGE JACKSON,
PETITIONER,

v.

LIQUID CARBONIC CORPORATION,
AND DAVID FARRELL AND BARRY MANUEL,
D/B/A INDUSTRIAL MEDICAL CENTER,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief of Respondent, Liquid Carbonic Corporation in Opposition.

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May 18, 1989

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED

1. Does § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, pre-empt state-law privacy claims asserted by a unionized employee after his termination, when:

(a) the employee was employed as a truck driver under a collective bargaining agreement which authorized the employer to issue reasonable rules and regulations, and to require the covered employees to undergo the periodic physical examinations mandated by federal highway safety laws; and

(b) the physical examinations mandated under those laws required the employees to furnish urine specimens for urinalysis; and

(c) the employer, in the exercise of its contractual authority, and as a condition of employment under the agreement, prescribed a drug-screen for the urine specimens furnished under those pre-existing federal requirements; and

(d) the employee was terminated after the prescribed drug-screen revealed the presence of drugs in his urine; and

(e) the employee's union and exclusive bargaining representative under the collective-bargaining agreement did not seek to arbitrate the employee's claims under the grievance and arbitration provisions of the collective-bargaining agreement; and

(f) the privacy claims challenge the

propriety and application of the drug-screen.

2. Does a federal court's diversity-case ruling that § 301 pre-empts a state-law privacy claim preclude the state from thereafter determining the scope of its privacy law with relation to claims of a similar nature?

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

No. 88-1586

GEORGE JACKSON,

Petitioner,

v.

LIQUID CARBONIC CORPORATION,
and DAVID FARRELL and BARRY MANUEL,
d/b/a INDUSTRIAL MEDICAL CENTER,

Respondents.

BRIEF OF RESPONDENT LIQUID CARBONIC CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Defendant-Respondent Liquid Carbonic Corporation ("L-Corp.") opposes the Petition for Writ of Certiorari filed by Plaintiff-Petitioner George Jackson ("Jackson"). The Petition raises no significant legal issue, and misreads or misapplies the governing decisions of this Court.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). Removal jurisdiction was asserted below under 28 U.S.C. § 1441 on grounds of diversity of citizenship and requisite amount in controversy under

28 U.S.C. § 1332(a). (App. 7a, 71a)[1]/

1/ "App. 7a, 71a" refers to pages 7a and 71a of the appendix to the Petition. Similar references are used throughout this brief.

STATEMENT OF THE CASE

A. The Facts

At the time of his dismissal by L-Corp. in February, 1986, Jackson was employed as a truck driver in a bargaining unit of L-Corp. employees covered by a collective-bargaining agreement ("the Agreement") between L-Corp. and a Local ("the Local") of the Teamsters Union. As noted in the First Circuit's majority opinion below, Jackson's job was to haul "pressurized gases . . . which were invariably volatile [and] often hazardous." (App. 3a) During his ten years of employment by L-Corp. (App. 2a), Jackson was accordingly subject to the safety regulations issued by the Federal Highway Safety Administration of the United

States Department of Transportation. These regulations mandated that covered truck drivers submit to biennial medical examinations which required, inter alia, submission of urine specimens for diabetes urinalysis. (App. 4a)

At all material times, the Agreement empowered L-Corp. to issue "reasonable rules and regulations," and to require the covered employees to undergo periodic physical examinations. In addition, the Agreement prohibited L-Corp. from discharging employees except for "just cause," and mandated arbitration of all unresolved grievances. (App. 5a-6a, 74a-75a, 80a-82a)

In March, 1985, while the Agreement was in effect, L-Corp. issued a directive which added drug-screening to the

urinalysis already required of its truck drivers under the federal program. L-Corp. notified all the drivers that their consent to the drug-screen was a condition of continued employment. Jackson consented, and neither he nor the contracting Teamster Local challenged the drug-screen at the time. (App. 4a-5a)

In January, 1986, Jackson took a scheduled physical examination and submitted a urine specimen, as he had routinely done in the past on such occasions. In February, 1986, L-Corp. informed Jackson that the drug-screen of his specimen had detected traces of marijuana, and suspended him pending retesting. A week later L-Corp. discharged Jackson for the reason that retesting had confirmed the presence of

drugs in his urine. (App. 5a, 74a) Neither Jackson nor the Teamster Local filed a formal grievance under the Agreement against the discharge (App. 6a, 75a); nor have they ever attempted to invoke any of the remedies available to them under the Agreement, including arbitration, against any action of L-Corp. involved in this matter.

B. Proceedings Below

In December, 1986, Jackson commenced an action for equitable relief and damages against L-Corp. in the Middlesex County Superior Court of Massachusetts. The gravamen of the complaint was: (1) that L-Corp.'s conduct constituted a search and seizure of Jackson's urine in violation of Mass. G.L. c. 12, § 11H-11I ("the Massachusetts Civil Rights Act"),

in that it breached his rights to privacy, and to freedom from unreasonable searches and seizures, as secured by the state and federal constitutions; and (2) that the alleged seizure and the testing of the urine constituted an unreasonable invasion of Jackson's privacy in violation of Mass. G.L. c. 214, § 1B ("the Massachusetts Privacy Act").[2/] (Jackson also claimed relief on the ground that his dismissal constituted a wrongful discharge under Massachusetts common-law; however, he did not appeal from the District Court's dismissal of this particular claim, see infra.) (App. 9a)

2/ The texts of the Massachusetts Civil Rights Act, and the Massachusetts Privacy Act, are set out at pages 3-5 of the Petition.

L-Corp. removed the state-court action to the United States District Court for the District of Massachusetts on grounds of diversity of citizenship and requisite amount in controversy. (App. 7a, 71a) (L-Corp. also originally sought removal on the federal question grounds that Jackson's action constituted a suit for violation of a collective bargaining agreement under § 301 of the Labor Management Relations Act. Both the District Court and the First Circuit declined to address this basis of removal jurisdiction. (App. 7a, n.2; 71a, n.1))

On L-Corp.'s motion to dismiss, treated as a motion for summary judgment, the District Court granted summary judgment for L-Corp. on all of Jackson's claims, including the wrongful-discharge

claim. The court held that all of these claims necessarily implicated the terms of the Agreement, and hence were pre-empted by § 301 under the rule of Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 213, 220 (1985). (App. 77a-83a)[3/]

In affirming the summary judgment, the majority of the First Circuit's three-judge review panel conducted an extended analysis of the Massachusetts Civil Rights and Privacy statutes, and the decisions which the Massachusetts Supreme Judicial Court ("SJC") had issued thereunder to date. The majority found that L-Corp.'s drug-testing plan did not violate any right under either statute,

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3/ The text of § 301 is set forth at page 3 of the Petition.

which was "presently established" and existed independently of the Agreement. (App. 29a, n. 3, emphasis supplied) The majority found further that, if indeed Jackson had any claim against L-Corp. under either statute, ". . . it is based on rights secured by [the] Agreement, and must be pursued, therefore, only in the arbitral forum." (Id.) The majority concluded that resolution of Jackson's purported state law privacy claims "'requires the interpretation of a collective-bargaining agreement,'" and that Jackson's state-court action was therefore pre-empted by § 301 under the rule of Lingle v. Norge Division of Magic Chef, Inc., 108 S. Ct., at 1883, n.8. (App. 55a) In support of its application of the Lingle rule, the majority relied

on Utility Workers Union of America, AFL-CIO, Local No. 246, et al. v. Southern California Edison Co., 852 F.2d 1083 (9th Cir. 1988), cert. denied No. 88-1180, March 20, 1989. (App. 41a-42a)

The dissenting opinion characterized the majority's analysis of existing Massachusetts Privacy law as a "guess," and held that the case should be remanded to the state court for a determination of the state law claims. (App. 59a, 69a)

Thereafter, the court denied Jackson's petition for rehearing (including a request for certification of questions to the Massachusetts Supreme Judicial Court concerning the two statutes in issue), and suggestion for rehearing en banc. (Petition at 24; App. 86a)

SUMMARY OF ARGUMENT

There is no merit to the contention that the majority decision below conflicts directly with the decisions of this Court on the standard of § 301 pre-emption, and the waivability of pre-empted state-law rights. (Petition at 17-19, 28-34) This contention misreads this Court's decisions, and misrepresents the majority decision.

Contrary to the Petition at 19-28, the majority decision raises no federalism issue. The majority's analysis of the existing state of Massachusetts privacy law was an appropriate exercise of the federal court's well-settled authority to decide state-law issues in diversity cases.

The majority's ruling would not preclude Massachusetts from determining the scope of its privacy law vis-a-vis employees covered by collective-bargaining agreements.

The majority's pre-emption ruling is in accord with analogous cases from other circuits. In addition, this Court has recently denied certiorari in a case which is identical with the case at bar. Utility Workers Union of America, AFL-CIO, Local No. 246, et al. v. Southern California Edison Co., 852 F.2d 1083 (9th Cir. 1988), cert. denied No. 88-1180, March 20, 1989.

REASONS FOR DENYING THE PETITION

I. THE MAJORITY DID NOT DEPART FROM THIS COURT'S DECISIONS ON THE STANDARD OF § 301 PRE-EMPTION.

A. In Lingle, this Court held that § 301 pre-empts a purported state-law claim if the "pertinent principles of state law require[] construing the relevant collective-bargaining agreement." 108 S. Ct., at 1882, n.7. The Petition contends that the majority flouted this rule by finding only ". . . that petitioner's state law claims were not yet so clearly established by statute or judicial explication" as to preclude analysis of the Agreement. (Petition at 18-19)

The majority made no such finding. It did acknowledge that Massachusetts would be free in the future to endow unionized employees with an "independent"

right to be free from employer drug-testing. (App. 29a, n.3) But it did not find, as the Petition suggests, or even imply, that such action by the state was in the offing. On the contrary, it found that (1) no such independent right had been established, as of the time of its decision, under the state Civil Rights and Privacy statutes; (2) the established rule for resolving a workplace-privacy dispute under these statutes was a balancing of the employee's and the employer's respective interests; and (3) the SJC would look to collective bargaining agreements in applying the balancing test in future workplace drug-testing cases. (App. 15a-19a, 21a-29a, n.3, 46a) The last finding was fully in keeping with the

authority of the majority, as a federal court sitting in diversity, to decide unsettled state-law issues pending before it.[4/] It constituted an integral element of the state-law principles which the majority determined. Based on these principles, the majority concluded that the requisite balance could not be struck in the instant case without interpretation of the Agreement. (App. 31a-41a). Hence, Jackson's claims were pre-empted under Lingle. (App. 30a, 43a, 46a, 55a)

B. The Petition also contends that the majority violated the Lingle rule, in that (1) it found that Jackson's state-claims were "'not necessarily

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[4/] See further Part III infra.

independent of the labor contract,'" whereas (2) the "proper test is not whether state law claims are 'not necessarily independent' of the agreement, but whether they are necessarily dependent on the agreement." (Petition at 19)

Apart from this dubious wordplay,[5/] this contention misrepresents both the established pre-emption standard and the majority's decision. "Dependence" and "independence" are merely the obverse facets of the standard. This Court has articulated the principle of § 301 pre-emption as "substantial dependence"

5/ This statement of the assertedly "proper" test suggests that "not independent of" and "dependent on" have opposite or dissimilar meanings. But, if anything, they are semantic equivalents.

on a labor contract. Lueck, 471 U.S., at 220-221, restated in Lingle, 108 S. Ct., at 1881. But it typically applies the principle in terms of whether the disputed state-claim is "sufficiently independent" of the contract to escape pre-emption. Lueck, 471, U.S., at 213-214. Lingle, 108 S. Ct., at 1881-1882.

The majority's approach incorporated both aspects of the standard, with the "dependence" principle as the point of departure. (App. 13a-14a) In applying the principle, it inquired whether, under existing Massachusetts privacy law, Jackson had a right, "independent" of the Agreement, to be free from L-Corp.'s drug-screen, in the absolute (i.e., "necessary") sense of a constitutional or

statutory prohibition of drug-testing. It concluded that he did not. (App. 15a-30a, 34a-35a). It then inquired whether Jackson had a "clearly independent" right as a derivative of the "pertinent principles" of Massachusetts law. (App. 30a). In the context of the balance-of-interest principle, the majority said:

> "The question for this court, therefore, reduces to whether the balance of interests between Jackson and L-Corp. necessarily implicates the Agreement in some substantial sense."

(App. 30a -31a) Thus, the majority once again invoked the "substantial dependence" standard which the Petition claims that it did not apply. And it concluded that Jackson's claims were "clearly dependent" on the Agreement, and

thus pre-empted. (App. 54a)

C. There can be no doubt that the majority scrupulously followed this Court on the pre-emption standard. The Petition's claim to the contrary is patently false.

II. THE MAJORITY DID NOT DEPART FROM LINGLE ON THE ISSUES OF WAIVER OR WAIVABILITY.

A. Contrary to the Petition at 30-32, this Court did not decide in Lingle either (1) that pre-emption and waiver are separate issues in a § 301 pre-emption inquiry; or (2) that in conducting such an inquiry, the federal court must determine the waivability, under state law, of state-claims that are found not to exist independently of labor contracts.

In Lingle, the Court held that a unionized employee's retaliatory-discharge claim under a state workers' compensation statute was not pre-empted under § 301, because it was based on a right which was specifically created by the statute and could be adjudicated independently of the relevant labor contract. 108 S. Ct., at 1882-1883, 1885. The rationale of this decision reiterated the well-settled nonpre-emptability of an individual substantive right derived from "an

independent body of law."[6/] In dicta, the Court declined to decide "[w]hether a union may waive its members' individual, nonpre-empted state-law rights," a question which the Court characterized as "distinct from that of whether a claim is pre-empted under § 301." 108 S. Ct., at 1883, n.9, emphasis on "nonpre-empted" supplied. The Court added that, before

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6/ In Lueck, 471 U.S., at 213, n.8, the Court said:

> "In Alexander v. Gardner-Denver Co., 415 U.S. 36 ... (1974), the Court found that the NLRA conferred rights 'on employees collectively to foster the processes of bargaining,' Id., at 51, and distinguished such rights which could be waived by contract between the parties, on the one hand, from an individual's substantive right derived from an independent body of law that could not be avoided by a contractual agreement, on the other." (Emphasis supplied)

deciding that a state bar to waiver of nonpre-empted state-claims could itself be pre-empted, it would require clear evidence that such waiver had been intended. Id.

The dicta, on their face, applied only to the waivability, and waiver, of state-claims that are nonpre-empted because they are found to exist independently of a labor contract. This is indeed a different question from whether state-claims are dependent on a labor contract, and thus pre-empted, in the first instance.

As to the latter issue, it is well-settled that " . . . state-law rights that do not exist independently of private agreements, and that as a result can be waived or altered by private

parties, are pre-empted by those agreements." Lueck, 471 U.S., at 213, emphasis supplied, and see Id., n.8, referred to at n.6, supra. In this sphere, waiver is not, as the Petition erroneously urges, a separate issue from pre-emption. It is rather an aspect of the state-claim's dependency on the labor contract which requires its pre-emption.

B. In specific reliance on this teaching of Lueck, the majority below found that Jackson's purported state-claims depended to a great extent on the concessions which his union might have made to L-Corp. under the Agreement. Thus, in the majority's view, the scope of Jackson's privacy-expectations would hinge on

whether the mandatory drug-screen[7/] was a legitimate exercise of L-Corp.'s managerial right to issue "reasonable" rules and conduct "required" physical examinations. Since this determination would necessarily entail interpretation of the Agreement, Jackson's claims were pre-empted under the rule of Lueck and Lingle. (App. 35a-37a, 39a-41a) The majority cited, at App. 42a, the

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7/ The Petition erroneously characterizes L-Corp.'s drug-testing plan as "mandatory random drug testing." (Petition at 31, emphasis supplied) Random testing inherently connotes a " . . . program of testing at random of persons within the class" covered by the drug-test directive. Horsemen's Benevolent and Protective Association, Inc. v. State Racing Commission, 403 Mass. 692, 532 N.E.2d 644, 645 (1989). But L-Corp.'s plan applied to all members of the bargaining unit as a condition of continued employment. (App. 4a)

waiver-holding of the Ninth Circuit in Utility Workers, supra, 852 F.2d 1083, 1086 (9th Cir. 1988), cert. denied No. 88-1180, March 20, 1989 (claim that employer's unilateral implementation of drug-testing program violated employees' rights to privacy and freedom from unreasonable searches and seizures under state constitution, held pre-empted under § 301, where issue of whether employees' union had bargained away their claimed rights could not be resolved without reference to the employer's management rights under the labor contract.)

Contrary to the Petition, nothing in Lingle required the majority to make separate findings on pre-emption and waiver, or to determine in the first instance whether Jackson's claims were

waivable by the union under Massachusetts law. The Lingle dicta, supra, which the Petition cites on the waivability issues, and the authorities collected at p. 31, n.8 and p. 33, n.10 of the Petition, are all inapposite, since they apply only to state-claims arising from independent bodies of law, see n.6, supra.

II. THE MAJORITY'S DECISION DOES NOT RAISE ANY QUESTION OF FEDERALISM.

A. The Petition contends that the majority's decision, if allowed to stand, would lead to automatic removal on § 301 pre-emption grounds of any future state-privacy claims similar to Jackson's, and would bind the federal court on the merits of the claims, thereby precluding Massachusetts and its courts from ever

developing the scope of its privacy law with relation to employee drug-testing. (Petition at 22-23)

This confuses jurisdiction with merits, and fails to grasp that, as this Court has held, "§ 301 pre-emption . . . says nothing about the substantive rights a state may provide to workers when adjudication of those rights does not depend upon the interpretation of [collective bargaining] agreements." Lingle, 108 S. Ct., at 1883. As the Court opined, a state law could conceivably cover only unionized workers but remain unpre-empted if no collective-bargaining agreement interpretation was needed to resolve claims brought thereunder. Id., at 1882, n.7. Thus, nothing in § 301 or the majority's ruling

below would bar Massachusetts in the future from granting unionized workers individual privacy rights against drug-testing which were made clearly independent of the interpretation of collective-bargaining agreements. If the state should do so, then state-court actions grounded on such individual state-rights would not be removable on § 301 pre-emption grounds. Caterpillar Inc. v. Williams, 482 U.S. 386, 107 S. Ct. 2425 (1987). There is no basis for the Petition's federalism claim.

B. Jurisdiction below was asserted solely on diversity grounds. As a federal court setting in diversity, the First Circuit review panel was obliged to determine all the state-law issues pending before it, including those which

had not as yet been settled by direct decisions of the SJC. And, as to such unsettled issues, the First Circuit was obliged to predict what it conscientiously believed the SJC would find when confronted with them. Meredith v. City of Winter Haven, 320 U.S. 228, 234-237 (1943). Commissioner of Internal Revenue v. Bosch, 387 U.S. 456, 464-465 (1967). In essaying such a prediction, the First Circuit was entitled to consider analogous decisions of the SJC, scholarly works, and any other data tending convincingly to show how the SJC would decide the unsettled issues at hand, taking into account the trends and policies evinced by the relevant data. Michelin Tires (Canada) Ltd. v. First National Bank of Boston,

F.2d 673, 682 (1st Cir. 1981). Wright, Miller & Cooper, "Federal Practice and Procedure," § 4507 (1988 ed.).

The body of the majority's opinion discloses that it carefully and conscientiously carried out its mandate as a diversity-court in predicting that the SJC would bring collective-bargaining agreements into play in deciding cases of the instant nature. It is noteworthy that the Petition does not challenge the validity of any of the majority's stated bases for this "confident" (App. 28a) prediction. For instance, the Petition does not challenge the majority's conclusion that state privacy and constitutional law generally track the development of federal law. (Petition at 21) It argues only that the majority's

ruling has precluded Massachusetts from ever making its own determination of the matter. (Id., at 22) However, this is not the case, since a diversity-court's adjudication of unsettled state-law issues does not bind the state's highest court. Neu v. Grant, 548 F.2d 281, 283 (10th Cir. 1977). Given that the Petition has advanced no convincing reasons for questioning the majority's findings, they are entitled to acceptance by this Court. Bosch, supra, 387 U.S., at 464.

C. The Petition requests this Court, inter alia, to certify questions concerning the state Civil Rights and Privacy statutes to the SJC. (Petition at 23-27). However, it has advanced no reason to believe that the First Circuit erred in denying Jackson's prior request

for such certification, see p. 12, supra. Certification, where available, rests in the sound discretion of the federal court. Lehman Brothers v. Schein, 416 U.S. 386, 390-391 (1974). Where a federal diversity-court feels that the course which the state courts will take is reasonably clear, as is the case here, resort to certification is inappropriate. City of Houston v. Hill, ___ U.S. ____, 107 S.Ct. 2502, 2514 (1987). Bi-Rite Enterprises, Inc. v. Bruce Miner Co., Inc., 757 F.2d 440, 443, n.3 (1st Cir. 1985). Wright, Miller & Cooper, "Federal Practice and Procedure," supra, § 4248.

The Petition's request gains no support from the two drug-testing cases which the SJC decided after the issuance

of the majority's decision. (Petition at 24, n.5) Horsemen's, supra, 532 N.E.2d 644 (1989), involved a challenge under Article 14 of the Massachusetts constitution to a drug-testing program implemented by the state racing commission and does not address either of the Massachusetts statutes at issue in the instant case. Id, at 648. The SJC refused to find that mandatory, without-cause drug-urinalysis of race-track licencees was a reasonable search and seizure under the constitution merely because the racing industry is heavily regulated. It held that a reasonable need to invade the licensees' urologic privacy had not been demonstrated. 532 N.E.2d at 650-652. However, the SJC noted that the case

presented no public safety issue, and expressly reserved the result it would reach if confronted with such a case. Id, at 651, continuation of n. 3. Since the instant case does present a substantial public safety issue, the decision in Horsemen's obviously does not warrant certification. This is even more the case as to Bally v. Northeastern University, 403 Mass. 713, 532 N.E.2d 49 (1989), also cited by the Petition in this connection. The SJC construed the state Privacy and Civil Rights statutes, but in a context outside the scope of private employment. Id, at 54.

IV. THE MAJORITY'S DECISION ACCORDS WITH THE SUBSTANTIAL WEIGHT OF FEDERAL LAW ON EMPLOYEE DRUG-TESTING.

The dispositive issues in the instant case are identical with those in Utility Workers, supra, 852 F.2d 1083, on which the majority specifically relied (App. 42a), and in which this Court denied certiorari to the Ninth Circuit on March 29, 1989. There the Ninth Circuit held that § 301 pre-empted claims that the unilateral implementation of a drug-screen urinalysis by a nuclear power-plant operator violated its unionized employees' rights under the state constitution to privacy and freedom from unreasonable searches and seizures. The court ruled that the asserted state privacy-claims were "substantially dependent" on analysis of the employer's collective-bargaining agreement, which granted the employer the right to impose

reasonable work and safety rules, and provided for resolution of contract-disputes through grievance and arbitration.

The parallel to the instant case is exact. Given, as the majority found and as the Petition does not dispute, that Massachusetts has not absolutely banned drug-testing, the ultimate test of L-Corp.'s drug-screen was its "reasonableness" in the light of the specific circumstances. (App. 35a-36a) State-law privacy claims have at their core the individual's right to be free of objectively unreasonable searches or intrusions. See Restatement (Second) of Torts § 652B (1977). The scope of an employee's privacy-rights in the workplace, as against his employer's

business interests, therefore depends on the specific circumstances of his employment. It is this principle which underlies the balance-of-interests test which, as the majority found and the Petition does not dispute, governs the adjudication of workplace-privacy disputes under Massachusetts law.

Moreover, the highly regulated character of an industry and the nature of the workplace bear directly on the justification for intrusions on an employee's workplace-privacy. In Skinner v. Railway Labor Executives Association, ____ U.S. _____, 4 IER Cases 224 (March 21, 1989), this Court held that the drug-urinalysis mandated by federal railroad-safety regulations for private railroad employees was a

"reasonable" search under the Fourth Amendment, notwithstanding lack of individualized suspicion of drug-use. The Court ruled that the employees occupied safety-sensitive positions in an industry which is pervasively regulated by the federal government in the interest of public safety, and that their legitimate privacy-expectations were overridden by the government's compelling safety-interests. 4 IER Cases at

237-238.[8/] (See further the authorities cited on this point by the majority at App. 17a-19a.)

8/ In view of the undisputed parallelism between federal and state constitutional adjudication (App. 19a-20a), there is every likelihood that the SJC will follow Skinner in future Massachusetts privacy cases involving mandatory, no-cause drug-testing of employees in an industry which is regulated for public safety purposes. Consequently, there is no warrant for summary reversal and remand of this case to the First Circuit for further consideration in the light of Horsemen's supra, 532 N.E.2s 644, as requested by the Petition at 26, n.6. This Court in Skinner has, in effect, answered the public safety question which, as seen at pp. 35-36, supra, the SJC left open in Horsemen's.

The circumstances of a unionized worker's employment are defined by the collective-bargaining agreement. Here, as in Utility Workers, the employer was engaged in an industry which is pervasively regulated by the federal government in order to ensure public health and safety. Considering these "exigencies" of its industry (App. 38a), L-Corp. had an undeniable interest in determining whether its employees were drug-free. (App. 26a) Whether any action by L-Corp. in pursuit of that interest justifiably intruded on the employees' legitimate workplace privacy-expectations would necessarily

depend on the provisions of the Agreement, since it had established all of the parties' rights and obligations. To the extent that L-Corp's drug-screen can even be deemed a "search and seizure," it related to the urine specimens which the employees were already required to furnish under the pre-existing federal safety-regulations. It was the federal regulations which had legitimately intruded on Jackson's urologic privacy in the first instance. And the issue of whether the unilaterally implemented drug-screen unjustifiably invaded Jackson's already diminished expectations, manifestly hinged on whether it was an appropriate exercise of L-Corp.'s management rights under the

Agreement. As the majority found (App. 40a, 44a), the "reasonableness" of the drug-screen could be tested only under the grievance and arbitration provisions of the Agreement, remedies which neither Jackson nor his union attempted to invoke. Therefore, following Utility Workers, the majority concluded that the Agreement was the sole source of the elements of the state-law test for resolving the asserted state-law claims; hence the state-claims were pre-empted.

The majority's ruling, like the identical ruling in Utility Workers, accords with the substantial weight of federal authority on § 301 pre-emption of state tort claims by unionized employees against employer-mandated drug-testing. Strachan v. Union Oil Co., 768 F.2d 703

(5th Cir. 1985). Laws v. Calmat, 852 F.2d 430 (9th Cir. 1988). Kirby v. Allegheny Beverage Corp., 811 F.2d 253 (4th Cir. 1987). See Association of Western Pulp and Paper Workers v. Boise Cascade Corp., 644 F.Supp. 183 (D.Or. 1986)

CONCLUSION

The Petition has not raised any special or important reason for granting review of the majority's decision in this

case. Accordingly, the Petition should be denied.

Respectfully submitted,

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No. 88-1586

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

GEORGE JACKSON,

Petitioner,

v.

LIQUID CARBONIC CORPORATION,
and DAVID FARRELL and BARRY MANUEL,
d/b/a INDUSTRIAL MEDICAL CENTER,

Respondents.

REPLY BRIEF OF PETITIONER

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Respondents.

REPLY BRIEF OF PETITIONER

Petitioner George Jackson submits the following reply to Brief of Respondent Liquid Carbonic Corporation in Opposition ("Opp. Br.").

I. MASSACHUSETTS CONSTITUTIONAL AND PRIVACY LAW DOES NOT TRACK THE DEVELOPMENT OF FEDERAL LAW

A. To support its assertion that the petition raises no federalism issues,

the respondent claims that all parties in this case agree with the validity of the majority opinion's view that "state privacy and constitutional law generally track the development of federal law." Opp. Br.[1] at 32; see also id. at 41 n.8. Respondent is wrong. Petitioner vigorously disputes the majority's view that in privacy law as in constitutional law, Massachusetts law tracks the development of federal law, and that Massachusetts state courts depart from the decisions of federal courts only "to further their views of the principles embodied in the federal [law]." App.[2] 19a-20a.[3]

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[1] "Opp. Br." refers to Brief of Respondent Liquid Carbonic Corporation in Opposition.

[2] "App." as used herein refers to the Appendix to the Petition.

[3] Indeed, the divergence between

The Supreme Judicial Court of Massachusetts has "expressly observed that, when interpreting the Massachusetts Constitution, [it is] not bound by Federal decisions which are less restrictive in some aspects than [the Massachusetts] Declaration of Rights." Moe v. Secretary of Admin. & Fin., 382 Mass. 629, 651, 417 N.E.2d 387, 400 (1981). In accord with that observation, the Supreme Judicial Court has held that various provisions of the Massachusetts Declaration of Rights provide more substantive protection to individuals than exists under parallel

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Massachusetts law and federal law is one reason why petitioner claims that the majority's decision has usurped the state's power to decide for itself the scope of its privacy laws. See Petition at 20-22.

provisions of the United States Constitution, including those addressing such issues as the privilege against self-incrimination,[4] the right to free speech,[5] reproductive freedom,[6] the death penalty,[7] peremptory challenges to

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[4] Compare Attorney General v. Colleton, 387 Mass. 790, 444 N.E.2d 915 (1982) (transactional immunity necessary to supplant privilege under state constitution) with Kastigar v. United States, 406 U.S. 441 (1972) (use and derivative use immunity consitutionally adequate to displace the fifth amendment privilege).

[5] Compare Batchelder v. Allied Stores Int'l, Inc., 388 Mass. 83, 445 N.E.2d 590 (1983) (state constitution protects right to seek signatures on private property in connection with ballot access) with Hudges v. NLRB, 424 U.S. 507 (1976) (no right to picket in privately-owned shopping center under First Amendment).

[6] Compare Moe v. Secretary of Admin. & Fin., 382 Mass. at 645-50, 417 N.E.2d at 397-99 with Harris v. McRae, 448 U.S. 297, 317-18 (1980) (funding of medically necessary abortions).

[7] Compare District attorney for the Suffolk Dist. v. Watson, 381 Mass. 648,

exclude jurors on the basis of race,[8] and searches and seizures.[9]

Significantly, on issues involving the privacy interests of Massachusetts citizens, the Supreme Judicial Court has diverged from results reached by this Court "based on differences of opinion concerning the application of similar constitutional principles." Upton, 394 Mass. at 372, 476 N.E.2d at 555.[10] In

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411 N.E.2d 1274 (1980) with Furman v. Georgia, 408 U.S. 238 (1972).

[8] Compare Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499, cert. denied, 444 U.S. 881 (1979) with Swain v. Alabama, 380 U.S. 202, 222 (1965).

[9] Compare Commonwealth v. Upton, 394 Mass. 363, 476 N.E.2d 548 (1985) with Illinois v. Gates, 462 U.S. 213 (1983) (determination of probable cause); Compare Commonwealth v. Blood, 400 Mass. 61, 507 N.E.2d 1029 (1987) with United States v. Caceres, 440 U.S. 741, 750-51 (1979) (one-party consent to warrantless electronic surveillance).

[10] Thus, for purposes of art. 14 of the state constitution, the Supreme Judicial

addressing the specific issue of drug testing based on reasonable suspicion, the Supreme Judicial Court has imposed a more stringent standard under the state constitution than this Court imposed under the federal constitution in Skinner v. Railroad Labor Executives Assoc., ___ U.S. ___, 109 S.Ct. 1402, 1422 (1989). In Horsemen's Benevolent and Protective Association, Inc. v. State Racing Commission, 403 Mass. 692, 702-03, 532 N.E.2d 644, 650 (1989), the Supreme Judicial Court concluded that under the state constitution a

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Court specifically "rejected the 'totality of the circumstances' test now espoused by a majority of the United States Supreme Court," and instead adhered to the Aguilar-Spinelli test rejected by the Court in Illinois v. Gates, 462 U.S. 213 (1983). See Upton, 394 Mass. at 373, 476 N.E.2d at 556.

"regulation providing for testing [of race track licensees] on reasonable suspicion must contain the requisites of probable cause," i.e., facts and circumstances sufficient to warrant a prudent person's belief that a licensee more probably than not has used illicit drugs.[11] Compare Skinner, 109 S.Ct. at 1422 (probable cause not required for urine testing based on reasonable suspicion).

B. Moreover, contrary to the

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[11] To be sure, Horsemen's is not a case in which the state's interest in drug testing raised public safety considerations. See id. at 703-04 n.3, 532 N.E.2d at 650-51. But, even assuming that safety concerns motivated respondent to promulgate its mandatory drug testing program, there is no basis for assuming that the Supreme Judicial Court would make an exception to teh state's probable cause reqiurement under the circumstances presented by this case.

majority's and respondent's conclusion, nothing in any state court decision suggests that the Supreme Judicial Court would require interpretation of the collective-bargaining agreement to resolve petitioner's privacy claims. Because constitutional and common law privacy analysis is in part a question of balancing, the analysis would focus on two things: the employer's interest in the testing and the employee's privacy interests.[12] The analysis may

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[12] It should be noted that respondent's insinuation that its drug testing program may not have implicated any of petitioner's privacy interests since petitioner was already obligated to provide a urine sample under federal regulations, see Opp. Br. at 43, fails to consider the impact of the chemical analysis of the urine and the release of private information. Thus, independent of the taking of the urine sample for testing, both the analysis of the urine samples -- which can disclose a range of private medical facts, such as whether an employee is taking birth control pills or other medication or is pregnant

also include such factors as the extent of regulation in the industry and the nature of the workplace. But there is nothing from which to conclude that a collective bargaining agreement need be scrutinized in that analysis.

C. Finally, in light of the Supreme Judicial Court's history of independence from federal law in its interpretation of state constitutional provisions, and specifically in light of its decision in Horsemen's, respondent's forecast that the Supreme Judicial Court would follow the decision in Skinner if faced with claims such as petitioner's, see Opp. Br. at 41 n.8, is simply unfounded. In

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-- and the potential sharing of the test results with managerial personnel, see App. at 27a-28a, violate an employee's privacy interests. See Horsemen's, 403 Mass. at 700, 532 N.E.2d at 649.

any event, the state court may never have an opportunity to address claims such as those raised by petitioner since it is undisputed that such claims would be considered "completely preempted" for purposes of removal jurisdiction if the judgment of the court below is allowed to stand. See Petition at 21-23.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the petition, the Court should grant the petition for a writ of certiorari and summarily reverse the judgment of the court of appeals, or, in the alternative, grant plenary review.

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Respectfully submitted,

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